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IN THE

Supreme Court of the United States

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., and WELLSVILLE, OHIO, CONGREGATION OF JEHOVAH'S WITNESSES, INC.,

Petitioners,

v.

VILLAGE OF STRATTON, OHIO, and JOHN M. ABDALLA, Mayor of the Village of Stratton, Ohio, in his official capacity,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Under the Free Exercise of Religion, Free Speech, and Free Press Clauses of the First Amendment to the United States Constitution, must a municipal ordinance regulating uninvited peddling and solicitation be narrowly tailored to the least restrictive means necessary to achieve an actual compelling governmental interest, when that ordinance requires religious ministers to obtain permits prior to door-to-door communication of their religious beliefs and dissemination of religious literature at no charge?

2. Does a municipal ordinance that requires one to obtain a permit prior to engaging in the door-to-door advocacy of a political cause and to display upon demand the permit, which contains one's name, violate the First Amendment protection accorded to anonymous pamphleteering or discourse?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Watchtower Bible and Tract Society of New York, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock, in that it is a non-stock corporation.

Petitioner Wellsville, Ohio, Congregation of Jehovah's Witnesses, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock, in that it is a non-stock corporation.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	x
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions and Ordinances Involved	1
Statement of the Case	2
Reasons for Granting the Writ	7
I. There exists a conflict among the circuits, which extends to the courts of last resort of several states, as to the applicable level of judicial scrutiny utilized to review the constitutionality of an ordinance that burdens activity involving the free exercise of religion in conjunction with freedom of speech and freedom of press.	9

Contents

Page

II. The Sixth Circuit's decision requiring individuals desiring to engage in anonymous door-to-door political communication to obtain a permit conflicts directly with *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999). 20

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Brown v. Hot, Sexy and Safer Prod., Inc., 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996) 13

Buckley v. American Constitutional Law Found., Inc., 525 U.S. 182 (1999) 20, 21, 22

Cantwell v. Connecticut, 310 U.S. 296 (1940) 14

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) 16

City Chapel Evangelical Free Inc. v. City of South Bend, 744 N.E.2d 443 (Ind. 2001) 12

City of Boerne v. Flores, 521 U.S. 507 (1997) 11

Coleman v. City of Griffin, 189 S.E. 427 (Ga. Ct. App. 1936), *appeal dismissed*, 302 U.S. 636 (1937) 10

Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604 (1996) 17

Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991) 12

Page

Denver Area Educ. Telecomm. Consortium, Inc. v. Fed. Communications Comm'n, 518 U.S. 727 (1996) 18

Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990) 9, 11, 14, 15, 16

Equal Employment Opportunity Comm'n v. Catholic Univ. of America, 83 F.3d 455 (D.C. Cir. 1996) 12

First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174 (Wash. 1992) 12

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) 17, 20

Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174 (4th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997) 13

Hill-Murray Fed'n of Teachers, St. Paul, Minn. v. Hill-Murray High School, Maplewood, Minn., 487 N.W.2d 857 (Minn. 1992) 13

Intercommunity Ctr. for Justice and Peace v. Immigration and Naturalization Serv., 910 F.2d 42 (2d Cir. 1990) 13

Lovell v. City of Griffin, 303 U.S. 444 (1938) 10, 16

Page

Martin v. City of Struthers, 319 U.S. 141 (1943) .. 18, 19

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) 20, 21, 22

Miller v. Reed, 176 F.3d 1202 (9th Cir. 1999) 12

Murdock v. Pennsylvania, 319 U.S. 105 (1943) ... 8, 14

People v. DeJonge, 501 N.W.2d 127 (Mich. 1993) .. 12

Salvation Army v. Dept. of Cmty. Affairs of N.J., 919 F.2d 183 (3d Cir. 1990) 12

Schneider v. New Jersey, 308 U.S. 147 (1939) 10, 18

South Jersey Catholic School Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary School, 696 A.2d 709 (N.J. 1997) 12

State v. DeLabruere, 577 A.2d 254 (Vt. 1990) 12

Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994), *cert. denied*, 513 U.S. 979 (1994) 12

Swanson v. Guthrie Indep. School Dist. No. I-L, 135 F.3d 694 (10th Cir. 1998) 12

Page

Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134 (9th Cir. 2000), *cert. denied*, __ U.S. __, 121 S. Ct. 1078 (2001) 13

Tucker v. Randall, 15 A.2d 324 (N.J. 1940) 10

Turner Broad. Sys., Inc. v. Federal Communications Comm'n, 512 U.S. 622 (1994) 16

United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) 16, 18

United States Constitution:

First Amendment ..... *passim*

Fourteenth Amendment 3

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 3

28 U.S.C. § 1343 3

28 U.S.C. § 2201 3

28 U.S.C. § 2202 3

42 U.S.C. § 1983 3

42 U.S.C. § 1985 3

Page

Ordinance § 116.03(b)(5) 4

Ordinance § 116.03(b)(6) 4

Ordinance § 116.05 4

Ordinance § 116.07 ..... 2, 3, 18

Other Authorities:

Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 Ohio St. L.J. 409 (1986) .. 8

Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990) 9

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Sixth Circuit Dated, Decided And Filed February 20, 2001 ..... 1a

Appendix B — Memorandum Order Of The United States District Court For The Southern District Of Ohio, Eastern Division Dated August 6, 1999 ..... 37a

Appendix C — Final Order Of The United States District Court For The Southern District Of Ohio, Eastern Division Dated August 18, 1999 ..... 47a

Appendix D — Opinion And Order Of The United States District Court For The Southern District Of Ohio, Eastern Division Dated February 23, 2000 And Filed February 24, 2000 ..... 49a

Appendix E — Relevant Ordinance 58a

Watchtower Bible and Tract Society of New York, Inc., and Wellsville, Ohio, Congregation of Jehovah's Witnesses, Inc., Petitioners, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 240 F.3d 553 (6th Cir. 2001) (App. A). The opinion of the United States District Court for the Southern District of Ohio is reported at *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 61 F. Supp. 2d 734 (S.D. Ohio 1999) (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 20, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press . . ."

This case involves Ordinance No. 1998-5, "Ordinance Regulating Uninvited Peddling and Solicitation Upon Private Property in the Village of Stratton, Ohio, and Amending Ordinance No. 1996-__ of the Ordinances of the Village of Stratton, Ohio." This is set forth in full in the Appendix. Petitioners did not challenge section 116.07 "Owner's/Occupant's Prohibition Against Entry" of the Ordinance.

STATEMENT OF THE CASE

Jehovah's Witnesses consider it part of their individual responsibility to follow Jesus' example and go from house to house to speak to people about the gospel of Christ, in imitation of Jesus himself going from door to door to teach people about his message. As part of their public ministry, they offer Bible-based literature to anyone who is interested in receiving it. Such literature is given free of charge, and is published by Watchtower Bible and Tract Society of New York, Inc., a not-for-profit, tax-exempt religious and charitable organization.

The Village of Stratton, Ohio, promulgated an "Ordinance Regulating Uninvited Peddling and Solicitation Upon Private Property . . ." which requires anyone desiring to engage in door-to-door activity to obtain a permit from the Mayor. This permit is to be issued at no cost. This ordinance was the successor to a prior ordinance, which the Village revised after Watchtower disputed its applicability and constitutionality.

Ministers associated with the local congregation of Jehovah's Witnesses, the Wellsville, Ohio, Congregation of Jehovah's Witnesses, Inc., have experienced difficulties with

Village officials about their door-to-door ministry as far back as 1979. In the early 1990s, a Village policeman chased a group of Jehovah's Witnesses out of town, stating, "I could care less about your rights." (TR 58). The matter came to a head in 1998 when Stratton's Mayor personally confronted four Jehovah's Witnesses, who were driving out of the Village after having returned to speak with residents who had on previous occasions showed interest in having Bible-based discussions. After they advised the Mayor that they were "sharing Bible thoughts" (TR 77) with people, the Mayor told the Witnesses that they were not allowed to be in the Village, that people had moved to Stratton with the understanding that they would not be bothered by Jehovah's Witnesses, and that, if they had been men, he would have taken them and put them in jail. (TR 77). The Village shortly thereafter amended its Ordinance.

The Village's Ordinance became the subject of an action brought in the District Court for the Southern District of Ohio by the Congregation and Watchtower. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1343, 2201 and 2202 in that the validity of the Village of Stratton's Ordinance[1] was challenged under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§ 1983 and 1985.

On August 18, 1999, U.S. District Court Judge Edmund A. Sargus issued a final order, holding that the Ordinance applied to Jehovah's Witnesses in that they were "canvassers" who visited homes in neighborhoods for the purpose of

1. Petitioners did not contest § 116.07 "Owner's/Occupant's Prohibition Against Entry," by which a resident can post a "No Solicitation" sign and thereafter register with the Mayor his desire not to be solicited.

"explaining" their "'cause,' the Gospel of Jehovah." (App. B, 39a-40a). However, the court held three provisions to be improper. Section 116.03(b)(5) of the Ordinance requires an applicant to list the specific address of each private residence he intends to visit. Although agreeing that this provision is onerous, the court held that it was proper, because the Village agreed to provide a list of addresses, which could be appended to the permit application. Section 116.03(b)(6) requires "[s]uch other information concerning the Registrant and its business or purpose as may be reasonably necessary to accurately describe the nature of the privilege desired." (App. B, 41a). The court held this to be satisfied by allowing one to note his participation in "the Jehovah's Witness ministry." (App. B, 42a). Section 116.05 limited door-to-door activity to between 9:00 a.m. to 5:00 p.m., even with a permit. The district court found this to be an invalid restriction of a canvasser's right to visit homes "during reasonable hours" (App. B, 43a) and ordered the Ordinance modified to allow activity "to occur during reasonable hours of the day." (App. B, 44a).

Except for those three provisions, the court found all of the challenged provisions of the Ordinance to be "valid, content neutral governmental regulations designed for the safety and security of the Village residents." (App. B, 41a). The court was not willing to reach the conclusion that the Ordinance was not neutral because at least six separate solicitors for school fund-raisers "were granted permission to solicit within the Village outside the time limits." (App. B, 42a). However, the court did strike the listing "Jehovah [sic] Witnesses" in the Registration Form — noting that "[n]o other religious group is listed separately or singled out on this list. . . . Although the Registration Form is an

administrative form designed to facilitate compliance with the Ordinance, its language and its form must be content neutral." (App. B, 45a).

The Sixth Circuit affirmed, holding that the Ordinance was content neutral and of general applicability, and therefore was subject to intermediate scrutiny. It further held that Petitioners' alleging infringement of freedom of speech, free exercise of religion, and freedom of press did not serve to elevate the level of scrutiny.

The circuit court held that the Ordinance was not unconstitutionally overbroad in that its requirement to reveal one's name did not rise to a level of impinging anonymous political speech because canvassers revealed a portion of their identity in the act of going from door to door.

The circuit court also held that the Ordinance's use of the term "cause," in describing what speech was within its purview, was not unconstitutionally vague because it was not modified, but included all causes.

As to the free speech claims, the circuit court examined the Ordinance to determine if it was narrowly tailored to serve a significant government interest and left open ample alternatives for communication. It found that the government interests the Village sought to promote — protecting its residents from fraud and undue annoyance in their homes — were sufficiently significant. It also found the harm the Village sought to prevent — criminals passing as canvassers in order to defraud its residents — was a real threat. The court paid deference to the Village's predictive judgment in enacting the Ordinance to protect its residents against this anticipated harm. It also held that the Ordinance protected

privacy in that one could be penalized for ignoring a "No Solicitation" sign. As to fraud, the court held the Ordinance would assist the Village both in turning away individuals who were posing as Jehovah's Witnesses and in apprehending any individual committing fraud. Finally, the court held that several alternatives to door-to-door canvassing were available — specifically, stores, street corners, restaurants, parks, and other public forums.

As for the free exercise claims, the court held that the Village Ordinance was not a flat prohibition on the dissemination of ideas and did not leave discretion in granting a permit to the Mayor. It also found the law to be content neutral, holding that reference to Jehovah's Witnesses was not part of the text of the Ordinance but part of a form, which language was ordered removed by the district court. The court also found that the Mayor's statements that he would not grant Jehovah's Witnesses an exemption from the Ordinance's time restrictions did not compel a finding that he unequally applied the Ordinance because Jehovah's Witnesses never requested an exemption from the Ordinance's time restrictions. Finally, the court found the Ordinance to be of general applicability because it was not written to impose a burden only on conduct motivated by religious belief.

The court also denied Petitioners' request for an exemption from the Ordinance and affirmed the district court's award of attorneys' fees to Petitioners.[2]

2. On February 24, 2000, the district court issued an opinion and order awarding attorneys' fees (App. D, 49a) pursuant to finding Petitioners to be prevailing parties and substantially successful in their action in that the court enjoined the Village's discriminatory

(Cont'd)

The dissent agreed with the majority that the Ordinance was not unconstitutionally vague, did not violate free exercise rights of Jehovah's Witnesses, that intermediate scrutiny was the proper standard of review because the Ordinance was neutral on its face, and that the award of attorneys' fees was proper. However, the dissent disagreed with how intermediate scrutiny was applied and would have held that the Ordinance violates the First Amendment, because it burdens more speech than is necessary to further the Village's legitimate interests. The dissent was concerned that subjecting non-commercial solicitation to the Ordinance's permit requirements restricted a substantial amount of speech unrelated to fraud. Further, the dissent noted that the availability of other outlets for speech did not alleviate the special burden placed on door-to-door solicitation. In addition, the dissent felt that enforcing trespass laws was a less restrictive means in protecting homeowners from unwanted annoyance. Finally, the dissent stated that the Village failed to demonstrate either the reality of the harm or the efficacy of the restriction and would have held the Ordinance's permit requirement to be an unconstitutional infringement of Jehovah's Witnesses' First Amendment rights.

REASONS FOR GRANTING THE WRIT

More than any other religious group in the history of American jurisprudence, Jehovah's Witnesses have successfully relied upon this Court to safeguard their rights

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form designed to implement the Ordinance, Jehovah's Witnesses no longer needed to provide a detailed description of their intended activities, and they would benefit both from the Village's concession to provide a list of all residents in town and by the removal of the 5:00 p.m. limit.

to free speech, free press, and freedom of worship against municipal efforts at prohibition or regulation. The Witnesses were, and are, motivated by their firmly held religious convictions: "Moreover, the Witnesses conscientiously objected to applying for a license; they thought the state had no right to license religious teaching." Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 Ohio St. L.J. 409, 419 (1986). Their efforts in the 1930s and 1940s achieved a restoration "to their high, constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs and the tenets of their faith through distribution of literature." *Murdock v. Pennsylvania*, 319 U.S. 105, 117 (1943). As a result, legal conflicts between municipalities and the Witnesses regarding their public ministry ceased — being relegated to dim memory and law students' review of the constitutional underpinnings of First Amendment jurisprudence.

Comes now the Village of Stratton, Ohio. In passing an ordinance purportedly designed to address the prevention of consumer fraud and protection of residential privacy, it subjected the pure religious speech and press activity of Jehovah's Witnesses to the prior restraint of obtaining a permit, notwithstanding that the Witnesses engaged only in non-commercial speech and made literature published by Watchtower available free of charge to those interested in reading it.

Despite the unfortunate echo to a prejudiced past of Stratton's Mayor bragging that people move into his Village because they know they will be free from the message of Jehovah's Witnesses (TR77), the inference that it is his intent to satisfy their expectations, and his stated belief that no one in the Village wants to listen to Jehovah's Witnesses (TR129),

the circuit court upheld Stratton's permit scheme. The Sixth Circuit Court of Appeals determined that this Court's decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990) dismantled the protection that this Court has long afforded the communication of religious beliefs. Thus arises a question that can only be answered by this Court: Are religious ministers engaged in a Scripturally based centuries-old practice of communicating their religious beliefs from door to door constitutionally equivalent to peddlers of merchandise, subject to the prior restraint of obtaining municipal permission to speak about the Bible or offer Bible-based literature at no cost?[3]

I. There exists a conflict among the circuits, which extends to the courts of last resort of several states, as to the applicable level of judicial scrutiny utilized to review the constitutionality of an ordinance that burdens activity involving the free exercise of religion in conjunction with freedom of speech and freedom of press.

Jehovah's Witnesses believe that they must perform a public ministry that includes talking to people at their residences about the Bible. It is among their deeply held religious convictions. The Bible-based literature published by Watchtower is distributed by individual Jehovah's Witnesses, who offer it free of charge to anyone who is interested.

3. It is instructive to note the influence of evangelical discourse in the genesis of the First Amendment's free exercise protection: "To determine the meaning of the religion clauses, it is necessary to see them through the eyes of their proponents, most of whom were members of the most fervent and evangelical denominations in the nation." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1437 (1990).

The Village of Stratton insisted that its Ordinance, which requires individuals to obtain permits issued at no charge prior to engaging in door-to-door activity, applied to the public ministry of Jehovah's Witnesses. The Village took this position despite the Witnesses' non-commercial activity: they offered Bible-based literature without charge and did not seek donations while speaking with people from door to door. The Village persisted in its demand that the Witnesses obtain a permit despite being advised that it is against their religious beliefs to obtain a permit before conducting their ministry. Therefore, to them the Ordinance would act as a ban on their activity. Witness do, of course, obtain a permit to build their meeting places, to marry, to drive — their religious objection to obtaining permission arises only in the context of their public ministry. In fact, Jehovah's Witnesses have a long-standing history of explaining to municipalities and courts that asking for the State's permission, as to this specific Scripturally based activity, is against their religious beliefs. *Coleman v. City of Griffin*, 189 S.E. 427, 428 (Ga. Ct. App. 1936), *appeal dismissed*, 302 U.S. 636 (1937); *Lovell v. City of Griffin*, 303 U.S. 444, 448 (1938); *Schneider v. New Jersey*, 308 U.S. 147, 159 (1939); and *Tucker v. Randall*, 15 A.2d 324, 325 (N.J. 1940).

Before this case, no court has required Jehovah's Witnesses to obtain the permission of a mayor prior to engaging in the door-to-door communication of their religious beliefs. Before this case, no court has required Watchtower to disseminate its religious literature only through ministers who have obtained permission from a municipality prior to the door-to-door dissemination. The Sixth Circuit, when faced with Petitioners' contention that the Village Ordinance burdens their rights under the Free Exercise Clause of the First Amendment (Jehovah's

Witnesses' evangelical activity in going to individuals' residences), in conjunction with their rights under the Free Speech Clause (speaking about the Bible) and Free Press Clause (the dissemination of Watchtower's literature), held that this Court's decision in *Smith* mandated its subjecting the ordinance to intermediate scrutiny. (App. A, 10a-12a). It further held that "[u]nder recent Supreme Court precedent, a law that is content neutral and of general applicability does not violate an individual's free exercise rights." (App. A, 26a).

The circuit court also held that *Smith's* discussion of "hybrid rights" (App. A, 11a), rather than being a synthesized articulation of the long history of protection this Court has accorded Free Exercise claims raised in conjunction with other constitutional protections, was merely "dicta and therefore not binding." (App. A, 12a). The Sixth Circuit did not follow this Court's clear and direct statement of law:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.

(App. A, 11a-12a). In commenting upon this language from *Smith*, this Court left no doubt that the statement reflected settled law: "The only instances where a neutral, generally applicable law had failed to pass constitutional muster, the *Smith* Court noted, were cases in which other constitutional protections were at stake." *City of Boerne v. Flores*, 521 U.S. 507, 513-14 (1997).

The Sixth Circuit's reducing this Court's holdings to "dicta and therefore not binding" (App. A, 12a) is in direct conflict with the holdings of the Third, Eighth, Ninth, Tenth, and District of Columbia Circuit Courts of Appeals.[4] It also conflicts with the holding of a state in its circuit, the Supreme Court of Michigan,[5] as well as the courts of last resort of Alaska, Indiana, New Jersey, Vermont and Washington.[6] The confusion underlying this conflict is widely noted — and can only be resolved by this Court:

> Thus we postpone, perhaps serendipitously, but ineluctably, definitive application of *Employment Division v. Smith* (citation omitted), and its newly developed hybrid rights doctrine to what had been deemed a live controversy arising in one of the states of this circuit. As our three-judge panel opinion and dissent demonstrate, together with the decisions of our sister circuits, *Smith* itself is fraught with complexity both in doctrine and in

4. *Salvation Army v. Dept. of Cmty. Affairs of N.J.*, 919 F.2d 183 (3d Cir. 1990); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991); *Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999); *Swanson v. Guthrie Indep. School Dist. No. I-L*, 135 F.3d 694 (10th Cir. 1998); *Equal Employment Opportunity Comm'n v. Catholic Univ. of America*, 83 F.3d 455 (D.C. Cir. 1996).

5. *People v. DeJonge*, 501 N.W.2d 127 (Mich. 1993).

6. *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994), *cert. denied*, 513 U.S. 979 (1994); *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443 (Ind. 2001); *South Jersey Catholic School Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary School*, 696 A.2d 709 (N.J. 1997); *State v. DeLabruere*, 577 A.2d 254 (Vt. 1990); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174 (Wash. 1992).

> practice. (Citations omitted). Perhaps the Supreme Court will have an opportunity before the issue arises again in this circuit to refine its approach in this area in light of the experience of five circuits.

Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1147-48 (9th Cir. 2000) (en banc) (O'Scannlain, C. J., concurring), *cert. denied*, __ U.S. __, 121 S. Ct. 1078 (2001).[7]

In harmony with this preceding statement, the Sixth Circuit Court of Appeals expressly requested this Court's direction:

> Based in part upon the lack of an explanation from the Court, we declined to alter the standard of scrutiny for laws affecting hybrid rights until the Supreme Court provided guidance. The Court has yet to provide such guidance, and therefore, we adhere to our decision in *Kissinger* and continue to decline to alter the standard of scrutiny.

(App. A, 12a). It is vital that this conflict among the circuits on such a significant issue of First Amendment jurisprudence be resolved by this Court.

7. There are indications that the First, Second, and Fourth Circuits, as well as the Supreme Court of Minnesota, have disagreed in principle with the 6th Circuit. *Brown v. Hot, Sexy and Safer Prod., Inc.*, 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996); *Intercommunity Ctr. for Justice and Peace v. Immigration and Naturalization Serv.*, 910 F.2d 42 (2d Cir. 1990); *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997); *Hill-Murray Fed'n of Teachers, St. Paul, Minn. v. Hill-Murray High School, Maplewood, Minn.*, 487 N.W.2d 857 (Minn. 1992).

The Free Exercise Clause of the First Amendment is not a redundancy — nor did this Court's holding in *Smith* so render it. *Smith* in no way signaled a retreat from the protection accorded the communication of religious beliefs recognized in *Cantwell v. Connecticut*, 310 U.S. 296 (1940) and so well articulated in *Murdock v. Pennsylvania*, 319 U.S. 105, 108-9 (1943):

> The hand distribution of religious tracts is an age-old form of missionary evangelism — as old as the history of printing presses. It has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits.

If Stratton had enacted an ordinance the effect of which was to require a priest, rabbi, or minister to obtain a permit to deliver a sermon to the congregation, it would be beyond peradventure that such an ordinance would be examined under the most exacting scrutiny that First Amendment jurisprudence could provide. Yet, the circuit court held that *Smith* required the ordinance to be subjected to merely "intermediate scrutiny" (App. A, 18a), which it defined as "narrowly tailored to serve a significant government interest

and left open ample alternatives for communication." (App. A, 18a). In so holding, the court noted that it would pay deference to "the predictive judgments of the government." (App. A, 18a). It also held that ample alternatives for communication did "not mean the least restrictive means of promoting the interest in question." (App. A, 19a).

The result of this lowered standard of scrutiny was a shifting of the burden of proof. Rather than deeming the ordinance "presumptively invalid," *Smith* at 888, and requiring the Village to overcome that presumption, the court showed deference to Stratton and its Mayor. The court was not troubled by — it did not even address — any of the Mayor's negative statements regarding Jehovah's Witnesses. The court did not explain how an inquiry into neutrality was not necessitated either by the district court's finding that Jehovah's Witnesses were the only religious group singled out by the Village in the administrative form or by the district court's comments that the "form must be content neutral." (App. B, 45a). The Mayor testified that he would not give a permit to Jehovah's Witnesses to go door to door after 5:00 p.m. because the Ordinance precluded activity after that time, although every non-Witness applicant who asked for an after-5:00 p.m. permit in fact received it. The court of appeals brushed this aside, stating that this was "not evidence of the purpose of the Village in promulgating the ordinance." (App. A, 11a). Despite this evidence of uneven enforcement, there was no inquiry by the court into whether the law was actually of general applicability.

The circuit court also ignored Watchtower's free press claim. As a publisher of literature, Watchtower is entitled to First Amendment protection. However, the circuit court made no attempt to reconcile its upholding Stratton's requirement

that a permit be obtained prior to dissemination of Watchtower's religious literature with this Court's holding in *Lovell v. City of Griffin*, 303 U.S. 444 (1938). In *Lovell*, this Court struck down an ordinance requiring Jehovah's Witnesses to obtain a permit prior to the dissemination of literature, noting: "The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.'" *Id.* at 452. (Citations omitted.)

In holding that it was not required to examine Stratton's encumbrances on the communication of religious beliefs utilizing strict scrutiny, the circuit court did not require the Village to justify the Ordinance by showing a compelling governmental interest. Therefore, there was no recognition that many laws will not survive such scrutiny. *Smith* at 888. *See also Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993). Rather, the court looked to determine if the Ordinance promoted a "significant government interest." (App. A, 19a). Stratton proffered only two interests — prevention of consumer fraud, particularly against the elderly, and protecting residents' privacy. However, the court did not require the Village to demonstrate that consumer fraud practiced by people going from door to door in Stratton was a real, rather than conjectural, interest.[8]

8. "[T]he Government must present more than anecdote and supposition." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 822 (2000); "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural . . ." *Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 664 (1994) (plurality opinion) (citation omitted).

The record contained no evidence that the Village ever experienced a single incident of consumer fraud related to door-to-door activity. In upholding the district court, the circuit court relied upon the testimony of the Mayor and Village solicitor, who were "aware of problems in other Ohio cities with door-to-door fraud," (App. A, 21a), its deference to the Village's "predictive judgments" (App. A, 18a), and the testimony of an Ohio State Assistant Attorney General, which was limited to opining that the Ordinance would be "helpful" in addressing the Village's interests. (TR 216).

A municipality cannot simply rely upon a proffered interest as if that interest were a talisman justifying whatever ordinance it seeks to enact. It has the burden to prove that there is a real problem to be addressed. *Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604 (1996). Rather than requiring the Village to meet the burden of proof necessary to overcome the heavy presumption against the validity of a permit scheme that imposes a prior restraint on speech (*see Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992)), the court noted that the evidence of "criminals posing as canvassers in order to defraud its residents — is a real threat. While the evidence of this reality is by no means overwhelming, we believe it is sufficient." (App. A, 21a).

The record is devoid of evidence to support the decision of the circuit court. There is no evidence of legislative history (town council minutes) supporting why this ordinance was necessary. There is no evidence that drafting an ordinance for the purpose of preventing fraud in commercial speech could not have been drafted to regulate only commercial speech. There is no evidence establishing why it was necessary to regulate noncommercial speech. There is no

evidence that enforcing existing Ohio criminal statutes (Ohio Charitable Solicitation Act, Consumer Sales Protection Act, Home Sales Solicitation Act) was insufficient to address the Village's interest in preventing fraud. Finally, there is no evidence that section 116.07 of the Ordinance, which permits an owner/occupant of a residence who does not want any solicitation to register his address with the Village and post a "No Solicitation" sign on his property, is not an effective means to protect the Village's interest.[9] The court did not require the Village to explain, let alone justify, why these other remedies, more narrowly tailored to the interest of preventing fraud and less restrictive[10] of religious speech and the dissemination of religious literature, were not utilized.

The other governmental interest advanced by the Village was the protection of privacy. In drafting the Ordinance, the Village's solicitor believed that there is "a Constitutional right not to be annoyed in my own home." (TR 177-78). The circuit court held that the Village's asserted interest in privacy was sufficient to support intermediate scrutiny. However, in exercising intermediate scrutiny, the court focused on section 116.07 of the Ordinance, a section which has not been challenged in this litigation.

This case challenges the permit scheme established by Stratton. The court of appeals did not explain how the permit

9. Since Petitioners did not contest this portion of the Village ordinance, the district court did not address its constitutionality.

10. When appropriate, requiring use of a less restrictive means remains part of First Amendment jurisprudence. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000); *Denver Area Educ. Telecomm. Consortium, Inc. v. Fed. Communications Comm'n*, 518 U.S. 727 (1996). It also has relevance with respect to religious speech claims. *See generally Schneider v. N.J.*, 308 U.S. 147 (1939); *Martin v. City of Struthers*, 319 U.S. 141 (1943).

scheme advances the Village's purported interest in privacy. Whether the visitor does, or does not, possess a permit, the occupant of a residence would still receive an unexpected knock on the door.

This Court has never held that the homeowner has a right, in the absence of any posted notice, not to have his door knocked upon (let alone whether the government has any interest — significant, compelling, or otherwise — in protecting this "right"). Of course, the occupant of a residence has a right to post a "No Trespassing" sign to keep visitors off his property. However, the circuit court did not address why posting such a sign was not adequate to address a privacy interest, as this sign would apply to all.

Interestingly, the court of appeals did not explain how the Village's action was not violative of the real constitutional right of the homeowner abridged in this case — the right of those desiring to receive information. *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943).

This case does not present individuals seeking to use religion as a blind to shield behavior deemed by society to be odious (*e.g.*, polygamy). It does not present a situation wherein religion is being used to evade compliance with governmental interests necessary to maintain the nation (*e.g.*, the payment of taxes). To the contrary, this case presents a situation in which the desired activity is that which is directly encompassed by the First Amendment — evangelizing, religious speech, and dissemination of literature. Jehovah's Witnesses do not contend that they are above the law, nor do they contend that a municipality must always yield to religion in all matters. They simply contend that when a municipality seeks to criminalize the exercise of First Amendment rights for not first obtaining that

municipality's permission, it must first do what it can to achieve its interests before it burdens that which the Constitution seeks to protect.

II. The Sixth Circuit's decision requiring individuals desiring to engage in anonymous door-to-door political communication to obtain a permit conflicts directly with *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999).

The decision by the circuit court permits a municipality to prohibit anonymous door-to-door political discourse or pamphleteering. Thus, the Sixth Circuit has decided in the affirmative an important federal question: May a municipality prohibit anonymous political communication in its attempt to regulate commercial solicitation, in a manner that conflicts with relevant decisions of this Court?

Jehovah's Witnesses are neutral in political affairs. (*Knowledge That Leads to Everlasting Life*, Plaintiffs' Trial Exhibit 6E, pg. 124, TR 86, referring to John 17:14). Nonetheless, without regard to their own interest, or lack of interest, in political discourse, and without waiving their assertions that their own First Amendment rights with respect to religious speech and press have been violated, Jehovah's Witnesses can properly challenge the Ordinance as being unconstitutionally overbroad, in that it also prohibits anonymous political discourse.[11]

11. This Court has permitted "a party to challenge an ordinance under the overbreadth doctrine" in situations creating "an impermissible risk of suppression of ideas" or where an "ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992) (citations omitted).

Under the Ordinance, one must obtain a permit from the Mayor in order to go door to door. This would include someone who wants to anonymously hand out a political leaflet or even one who would want to speak to her neighbors about the need for a new mayor. In order to obtain the permit, she would have to identify herself to the municipality. She would also have to produce the permit, which includes her name, to a resident upon demand. Such requirements destroy the anonymity afforded political speech as guaranteed by this Court in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995):

> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.

Stratton's ordinance removes that shield of anonymity. The municipality will know who is involved in the communication of political thoughts. Also, the Ordinance effectively prohibits anonymous door-to-door "interactive communication concerning political change" (*Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 186 (1999) (citation omitted)) in that it "compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest." *Id.* at 184. Under the Ordinance, a resident can demand to see the permit, which contains the speaker's name. Defying this Court's holding in *Buckley*, which held that "First Amendment protection for such interaction . . . is 'at its zenith'" (*id.* at 187 (citation omitted)), the Sixth Circuit held regarding "the ability to speak to others anonymously" (App. A, 15a):

> [W]e do not understand how Stratton's ordinance inhibits this right. As we see it, individuals going door-to-door to engage in political speech are not anonymous by virtue of the fact that they reveal a portion of their identities — their physical identities — to the residents they canvass. . . .
>
> While the ordinance requires political canvassers to reveal the remainder of their identities, i.e., their names, we do not believe that requirement rises to the level of impinging on First Amendment protected speech the Court sought to protect by fashioning the right in *McIntyre*.

(App. A, 15a-16a).

This Court upheld Mrs. McIntyre's right to personally distribute anonymous leaflets expressing thoughts designed to influence the electoral process. If the Sixth Circuit's decision stands, one can no longer engage in the same activity in Ohio, or Michigan, Kentucky, or Tennessee. Such a result is intolerably in conflict with this Court's holdings in *McIntyre* and *Buckley*, and must be rectified.

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED, DECIDED AND FILED FEBRUARY 20, 2001

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Watchtower Bible and Tract Society of New York, Inc.; Wellsville, Ohio, Congregation of Jehovah's Witnesses, Inc.,

Plaintiffs-Appellants
(99-4087)/Appellees,

v.

Village of Stratton, Ohio; John M. Abdalla, Mayor of the Village of Stratton, Ohio, in His Official Capacity,

Defendants-Appellees/
Appellants (00-3325).

Nos. 99-4087;
00-3325

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 99-00526 — Edmund A. Sargus, Jr., District Judge.

Argued: September 21, 2000

Decided and Filed: February 20, 2001

Before: MERRITT, KENNEDY, and GILMAN, Circuit Judges.

* * *

Appendix A

KENNEDY, J., delivered the opinion of the court, in which MERRITT, J., joined. GILMAN, J., delivered a separate opinion concurring in part and dissenting in part.

OPINION

KENNEDY, Circuit Judge. This case comes to the court on the consolidated appeals of plaintiffs, Watchtower Bible and Tract Society of New York, Inc. and Wellsville, Ohio, Congregation of Jehovah's Witnesses, Inc.; and of defendants, the Village of Stratton, Ohio, and its Mayor, John M. Abdalla. Plaintiffs appeal the district court's judgment denying portions of their First Amendment challenges to the Village's solicitation and canvass ordinance. On appeal they argue that the ordinance is facially unconstitutional because it is overly broad and vague, and, as applied, the ordinance violates their rights to free speech and free exercise of religion. Defendants appeal the district court's judgment awarding plaintiffs attorneys' fees as a prevailing party in the First Amendment litigation. They argue that the court erred in finding that plaintiffs were entitled to attorneys' fees, and in the alternative, if this court determines that plaintiffs were entitled to such fees, the amount the court awarded was unreasonable.

Because the ordinance is neither unconstitutionally overbroad nor vague and it is narrowly tailored to serve significant government interests, we affirm the district court's judgment finding the majority of the ordinance constitutionally permissible. And because the district court did not abuse its discretion in awarding plaintiffs reasonable attorneys' fees, we affirm that judgment as well.

Appendix A

I. FACTS

This dispute centers on the Village of Stratton's ordinance regulating the soliciting and canvassing of private homes in the Village. By its terms, the ordinance applies to "canvassers, solicitors, peddlers, [or] hawkers" that go on a private residence in the Village for the "purposes of advertising, promoting, selling and/or explaining any product, service, organization or cause." Such individuals must first register with the Office of the Mayor by filling out a Registration Form. The Registration Form requires the individuals to furnish information about their cause, why they are canvassing, which residences they intend to canvass, how long they intend to canvass, and any "other information concerning the Registrant[s] and [their] business or purpose as may be reasonably necessary to accurately describe the nature of the privilege desired."[1] Once the individuals have

1. Specifically, the relevant section of the Ordinance reads:

> The Form shall be completed by the Registrant and it shall then contain the following information:
>
> (1) The name and home address of the Registrant and Registrant's residence for five years next preceding the date of registration;
>
> (2) A brief description of the nature and purpose of the business, promotion, solicitation, organization, cause, and/or the goods or services offered;
>
> (3) The name and address of the employer or affiliated organization, with credentials from the employer or

(Cont'd)

registered, they "shall be furnished a Solicitation Permit" unless the Mayor determines that they (1) failed to complete the Registration Form, (2) provided fraudulent information on the form, (3) made false or fraudulent statements or misrepresentations while canvassing, (4) violated any other local, state, or federal laws, (5) trespassed while canvassing, or (6) ceased to possess the qualifications required to obtain a Solicitation Permit.[2] No fee is required to obtain a permit. Upon obtaining a permit, the canvassers may canvass any private residence in the Village between the hours of 9:00 a.m. and 5:00 p.m., provided the owner of the residence has not filed a No Solicitation Form with the Mayor's Office and has not posted a No Solicitation Sign on his property. Prior to this litigation, a No Solicitation Form contained a list of various organizations next to which the resident could

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(Cont'd)

organization showing the exact relationship and authority of the Applicant;

(4) The length of time for which the privilege to canvass or solicit is desired;

(5) The specific addresses of each private residence at which the Registrant intends to [canvass]; and

(6) Such other information concerning the Registrant and its business or purpose as may be reasonably necessary to accurately describe the nature of the privilege desired.

2. For the purposes of this opinion, we will refer to any activity covered by the ordinance as canvassing and those individuals engaging in such activities as canvassers.

place a checkmark to indicate the organizations the resident wished to be excluded from this general prohibition. While the No Solicitation Form listed several organizations by name, the only religious organization it listed by name was the Church of Jehovah's Witnesses.

If individuals covered by the ordinance fail to comply with these requirements, they could be charged with a misdemeanor of the fourth degree.

Plaintiffs challenged the ordinance in district court seeking a declaratory judgment that the ordinance is unconstitutional on its face and as applied to them and seeking a permanent injunction prohibiting the Village from enforcing the ordinance against them. After conducting a bench trial on the matter, the district court found that the ordinance applied to plaintiffs as they were "canvassers" seeking to explain their "cause." Moving to the constitutionality of the ordinance, the court rejected most of plaintiffs' arguments as without merit. The court did, however, find three provisions of the ordinance and one provision of an administrative form — some of which plaintiffs did not specifically challenge in their complaint — potentially constitutionally troubling, and therefore, took action to address those concerns. First, the court found that the 5:00 p.m. time restraint contained in the ordinance was an unreasonable restriction on time and ordered the Village to change the time restraint to allow for canvassing during all daylight hours. Second, it found that the section of the No Solicitation Form which singled out Jehovah's Witnesses was unconstitutional and ordered the Village to delete any reference to Jehovah's Witnesses from the No Solicitation

Form. Third, it found that in order for the ordinance's "additional information" requirement to be constitutional, Jehovah's Witnesses need only "note on the application that [they] seek[ ] to canvass as part of the Jehovah's Witness." Accordingly, the court construed the provision to require only that. Finally, it found that requiring plaintiffs to list on the Registration Form each residence they intended to visit was "an onerous regulation that could potentially violate the exercise of constitutional rights"; however, this problem was cured by the "Village allowing a Registrant to attach to the Registration Form a list of willing Village residents which is provided by the Mayor's office." It appears from the record that this was a voluntary measure taken by the Village prior to the lawsuit.

Unsatisfied with the scope of this relief, plaintiffs filed a timely notice of appeal from the court's judgment. The notice reads, "Plaintiffs . . . hereby appeal . . . those parts of the [district court's] Order . . . which uphold the constitutionality [—] facially and as applied to the Plaintiffs" — of the ordinance.[3]

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3. Plaintiffs are not appealing the portion of the ordinance the district court found unconstitutional and revised nor do they question the legitimacy of that ruling. Consequently, those questions are not before us. While we would likely have no problems with the court's decision to strike the time restriction provision from the ordinance as we believe it is severable under Ohio law, *see Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 202-03 (6th Cir. 1997), we would have a more difficult time with the court's attempt to rewrite that provision, *see Wilson v. National Labor Relations Bd.*, 920 F.2d 1282, 1289 (6th Cir. 1990) (recognizing that "courts cannot judicially redraft statutory language"). We are not concerned with

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In addition to filing an appeal, plaintiffs, based upon the judgment on the merits, filed a motion for attorneys' fees pursuant to 42 U.S.C. § 1988. The district court determined that plaintiffs were a prevailing party and therefore entitled to attorneys' fees. After reducing the requested award, the court awarded plaintiffs $58,892.41 in attorneys' fees and costs. Defendants filed a timely notice of appeal from that judgment.

The appeals are now consolidated and before us.

II. CONSTITUTIONALITY OF THE ORDINANCE

The First Amendment to the United States Constitution provides, "Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech, or of the press." U.S. Const. amend. I. The Supreme Court has made the First Amendment's prohibitions applicable to the states through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Because state action includes municipal ordinances adopted under state authority, *see Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938), the prohibitions extend to ordinances such as the one promulgated by Stratton. And because Stratton's ordinance requires canvassers to register prior to canvassing, it "carries with it (unless properly constrained) the power directly and substantially to affect speech" and must therefore

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(Cont'd)
the court's revision of the administrative forms as they are not part of the ordinance. Likewise, we are not concerned by the construction of the "additional information" provision of the ordinance, as courts routinely construe legislation so as to avoid constitutional problems.

undergo Free Speech Clause analysis. *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 801 (1988). And for similar reasons, it must also undergo Free Exercise Clause analysis.

A. Free Speech Challenges

Plaintiffs contend that the ordinance's requirement that canvassers register prior to canvassing fails the Free Speech Clause analysis both facially and as applied to them. Predictably, much of their argument is dedicated to attempting to convince us that the ordinance is subject to strict scrutiny. And as equally predictable, the Village dedicates a large portion of its brief to arguing that the ordinance is subject to some lower level of scrutiny.

1. Level of Judicial Scrutiny

As an initial matter, we note that the Supreme Court has not set forth a framework for determining what level of scrutiny to apply to laws that require an individual to obtain a permit prior to going door-to-door. It has, however, established a framework for answering the question in the context of laws requiring an individual to obtain a permit prior to engaging in speech in a public forum. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). We conclude that the analytical framework set forth there applies to this ordinance as well. We reach this conclusion because, in discussing what standard applied to the County's ordinance, the Court characterized its analysis as one of whether the law's restrictions on speech were reasonable in the context of time, place, and manner. As that analysis applies to all laws through which government regulates oral

or written expression, *see Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 n.8 (1984), and the ordinance regulates oral and written expression, it is subject to the reasonable, time, place, and manner analysis.[4]

Under that framework, a law that is content based is subject to strict scrutiny. *See Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 642 (1994). On the other hand, a law that is content neutral and of general applicability is subject to some form of intermediate scrutiny. *See Community for Creative Non-Violence*, 468 U.S. at 293.

Using that framework, the district court determined that the ordinance was content neutral and of general applicability and therefore subject to intermediate scrutiny. Plaintiffs argue that the district court erred and urge us to review the ordinance under strict scrutiny. Strict scrutiny applies, they argue, because the ordinance potentially infringes upon two constitutionally protected rights — freedom of speech and freedom of religion — thereby making their claim a "hybrid rights" claim. And, they continue, the Supreme Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), established that such claims subject the law in question to strict scrutiny. Hybrid rights claims aside, they argue, strict scrutiny applies because the ordinance discriminates based on the content of the speech. That discrimination is evidenced

4. The alternative would be to analyze the ordinance under the standard set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), and its progeny. That standard "is little, if any, different from the standard applied to time, place, or manner restrictions." *Community for Creative Non-Violence*, 468 U.S. at 298.

by the reference to Jehovah's Witnesses in the No Solicitation Form and the Mayor's testimony that he would not furnish Jehovah's Witnesses with an exemption from the time restraints. In either case, they conclude, we must apply strict scrutiny when reviewing the ordinance.

We cannot agree. Our review of the ordinance leads us to conclude it is content neutral and of general applicability, and hence, subject to intermediate scrutiny. A law is content neutral and of general applicability if on its face and in its purpose it does not make a distinction between favored and disfavored speech. *See Turner Broad.*, 512 U.S. at 642-50. On its face, there is no indication that the ordinance distinguishes between favored and disfavored speech; it requires all individuals seeking to canvass to register irrespective of the content of their message. *See Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981). Nor do we find any evidence that the Village's purpose in promulgating the ordinance was to regulate speech based on the message it conveys. Instead, our review indicates that the Village's principal objective in promulgating the ordinance was to prevent fraud and protect the privacy interests of the residents of the Village. *See Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989).

The evidence plaintiffs cite in support of their argument misses the mark. That the No Solicitation Form listed Jehovah's Witnesses is not evidence that the Village's purpose in promulgating the ordinance was to restrict their speech; rather, it is evidence of the Village's administration of the ordinance. And that evidence does not indicate that the Village applied the ordinance unequally. It may simply

be that Jehovah's Witnesses, along with the other organizations listed on the form, canvassed or solicited more frequently than other groups, thereby making it efficient to place their name on the form. Likewise, the testimony of the Mayor that he would not grant Jehovah's Witnesses an exemption from the ordinance's hours restriction is not evidence of the purpose of the Village in promulgating the ordinance. Nor is it evidence of the Village's application of the ordinance, as plaintiffs have not applied for an exemption. We do note, as the district court did, that were we to find disparate treatment in the granting of exemptions from the time restraints, we would be troubled. However, as our review finds nothing of the sort, we believe the ordinance is neutral on its face and the Village's purpose in promulgating it was content neutral. Therefore, we hold that it is subject to intermediate scrutiny.

In so holding, we reject plaintiffs' assertion that the Supreme Court established in *Employment Division v. Smith* that laws challenged by hybrid rights claims are subject to strict scrutiny. While much debate has revolved around the Court's language in *Smith*, we do not believe the Court held there, nor has it ever held, that a different level of scrutiny applies to laws that potentially affect hybrid rights. In rejecting the plaintiffs' argument that " 'prohibiting the free exercise [of religion]' includes requiring any individual to observe a generally applicable law," the *Smith* Court noted,

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause

> alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . .

Smith, 494 U.S. at 878, 881. That language was dicta and therefore not binding. Further, as we held in *Kissinger v. Board of Trustees of the Ohio State University*, 5 F.3d 177, 180 (6th Cir. 1993), aside from the fact that the *Smith* Court did not hold that a hybrid rights claim subjects a law to a higher level of scrutiny, the Court did not explain how a hybrid rights claim would alter the level of scrutiny (we note that the one probably had a lot to do with the other). Based in part upon the lack of an explanation from the Court, we declined to alter the standard of scrutiny for laws affecting hybrid rights until the Supreme Court provided guidance. The Court has yet to provide such guidance, and therefore, we adhere to our decision in *Kissinger* and continue to decline to alter the standard of scrutiny. Accordingly, the district court was correct to subject the ordinance to intermediate scrutiny in analyzing the merits of plaintiffs' free speech claims.

2. Merits of Free Speech Claims

It bears emphasis that, contrary to plaintiffs' assertions, Supreme Court dicta is not on their side. On numerous occasions the Court has strongly suggested that registration schemes such as the Village's would pass constitutional muster.

> Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons

> may, with impunity, commit frauds upon the public. . . . Without doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.

Cantwell, 310 U.S. at 306; *see also Martin v. City of Struthers*, 319 U.S. 141, 148 & n.14 (1943) (making clear that a city "can by identification devices control the abuse of the privilege by criminals posing as canvassers").[5]

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5. Several of our sister circuits have indicated in dicta that they would reject challenges to the identification portion of solicitation ordinances similar to Stratton's as well. *See, e.g., City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1557 (7th Cir. 1986) ("Watseka's attempt to safeguard its citizens' privacy and protect them from crime is laudable, and the majority of the ordinance's provisions are narrowly tailored to promote Watseka's objectives with only minimal interference with First Amendment rights. Indeed, IPAC is more than willing to comply with Watseka's registration requirements . . . . It is only the 5 p.m. to 9 p.m. complete ban on solicitation that fails to pass constitutional muster . . . ."); *Association of Cmty. Org. for Reform Now v. City of Frontenac*, 714 F.2d 813, 818-19 & n.7 (8ih Cir. 1983) ("Frontenac has a legitimate interest in protecting its residents from crime. This objective can be served satisfactorily by enforcement of the city's application and identification for all canvassers, peddlers, and solicitors."). Additionally, the Third Circuit has facially upheld an ordinance requiring canvassers to obtain a license prior to going door-to-door. *See Pennsylvania Alliance for Jobs & Energy v. Council of the Borough of Munhall*, 743 F.2d 182, 188 (3d Cir. 1984).

Appendix A

We begin our review with a brief discussion of the differences between as applied and facial challenges. "If a statute is unconstitutional as applied, the State may continue to enforce the statute in different circumstances where it is not unconstitutional, but if a statute is unconstitutional on its face, the State may not enforce the statute under any circumstances." *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir. 1997). Consequently, "a plaintiff's burden in an as-applied challenge is different from that in a facial challenge. In an as-applied challenge, the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional." *Id.* Generally, a plaintiff's burden in a facial challenge is higher: the plaintiff must prove that there is no set of circumstances in which the statute's application would be constitutional. *See id.* at 194. That is not the case, however, when the statute regulates speech. Because the remedy for successful facial challenges is broader in scope, we begin our analysis there.

a. Facial Challenges

"In a facial challenge to the overbreadth and vagueness of a law, the court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge . . . ." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). We proceed accordingly.

Appendix A

i. Unconstitutionally Overbroad

Plaintiffs argue the ordinance is unconstitutionally overbroad because it would have the effect of prohibiting individuals from going door-to-door to engage in political speech without first obtaining a permit. An effect, they allege, the Supreme Court effectively made unconstitutional in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), by invalidating an Ohio statute that prohibited the distribution of anonymous campaign literature. Because requiring individuals engaging in political speech to register before going door-to-door would effectively prevent them from remaining anonymous, they conclude, the ordinance is unconstitutional. They are mistaken.

McIntyre's holding misses Stratton's ordinance. The *McIntyre* Court established a First Amendment right to distribute political pamphlets anonymously. *See id.* at 357. We agree that read broadly, the opinion arguably includes in that right the ability to speak to others anonymously. But we do not understand how Stratton's ordinance inhibits this right. As we see it, individuals going door-to-door to engage in political speech are not anonymous by virtue of the fact that they reveal a portion of their identities — their physical identities — to the residents they canvass. In other words, the ordinance does not require canvassers going door-to-door to reveal their identities; instead, the very act of going door-to-door requires the canvassers to reveal a portion of their identities.

While the ordinance requires political canvassers to reveal the remainder of their identities, *i.e.*, their names, we

do not believe that requirement rises to the level of impinging on First Amendment protected speech the Court sought to protect by fashioning the right in *McIntyre*. By creating a right of anonymity, the Court sought "to protect unpopular individuals from retaliation — and their ideas from suppression." *Id.* Once the political canvassers are before the resident, the ability to protect them from those dangers is substantially diminished. Accordingly, there is little reason to read the Court's holding as protecting political canvassers from being required to reveal a portion of their identities when their very activity will reveal other portions of their identity and subject them to scrutiny.[6]

ii. Unconstitutionally Vague

v is unconstitutionally vague when it does not afford a "person of ordinary intelligence a reasonable opportunity to know what is prohibited," *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972), or when it authorizes or encouragers arbitrary and discriminatory enforcement, *see Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Put more specifically, a statute is vague when the state has "fail[ed] to provide such minimal guidelines" that would prevent "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)) (alterations in the original). The ordinance is such a

6. Even if *McIntyre* were implicated, we would find the ordinance constitutional on its face. In reviewing Ohio's statute, the Court applied strict scrutiny. As we have already noted, we are reviewing Stratton's ordinance under intermediate scrutiny. We believe the difference in scrutiny would be outcome determinative.

law, plaintiffs contend, because the meanings of the terms "solicitor," "canvasser," and "cause" are not clear. They offer no explanation for why "solicitor" and "canvasser" are vague; but contend that the Supreme Court has found the term "cause" to be vague.

We find no merit in any of these assertions. Only the last assertion requires any explanation. According to plaintiffs, the Supreme Court's decision in *Hynes v. Mayor & Council of the Borough of Oradell*, 425 U.S. 610 (1976), established that "the word 'cause' is unconstitutionally vague." Specifically, they point to footnote five of the opinion which states, "In the circumstances of this case these allegations are enough to put in issue the precision or lack of precision with which the ordinance defines the *categories* of 'causes' it covers." *Hynes*, 425 U.S. at 621 n.5 (emphasis added). The language plaintiffs quote defeats their argument. As the language indicates, in finding the ordinance vague, the Supreme Court did not criticize the use of the word cause, rather it criticized the ordinance's modification of the word with the phrases "recognized charitable" and "Federal, State, County or Municipal." Specifically, the Court stated that the ordinance "does not explain, for example, whether 'Recognized charitable cause' means one recognized by the Internal Revenue Service as tax exempt, or one recognized by some community agency . . . [and] it is not clear what is meant by a 'Federal, State, County, or Municipal' " cause. *Id.* at 621. Because Stratton's ordinance does not modify the term cause but includes all causes, the holding of and the reasoning in *Hynes* is not applicable.

b. As Applied Challenge[7]

In the context of an as applied challenge, a law requiring registration prior to engaging in speech would pass intermediate scrutiny if it were narrowly tailored to serve a significant government interest and left open ample alternatives for communication. *See Nationalist Movement*, 505 U.S. at 130. If the interest is in redressing past harm or preventing anticipated harms, the government must demonstrate that the harms are real. *See Edenfield v. Fane*, 507 U.S. 761, 770 (1993). An anticipated harm would be considered real if we determined that "there [was] a reasonable ground to fear that serious evil [would] result if free speech [were] practiced" without the regulation. *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995) (internal citations and quotation marks omitted). In making this determination, we pay deference to the predictive judgments of the government. *See Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973). A law would be considered narrowly tailored to promote the governmental interests if the interest "would be achieved less effectively absent the regulation," *Ward*, 491

7. Although the Village has not brought an enforcement action against plaintiffs, we believe plaintiffs have standing to proceed on their as applied challenge. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979). Because plaintiffs have "alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder," they are not "required to await and undergo criminal prosecution as the sole means of seeking relief." *Id.* at 298 (internal citations and quotation marks omitted).

U.S. at 799, and the regulation does not "burden substantially more speech than is necessary" in furthering the interest, id. And finally, while it is unclear exactly what constitutes ample alternatives for communication, it is clear that this standard does not mean the least restrictive means of promoting the interest in question. *See id.* at 797-98.[8]

As applied to them, plaintiffs argue, the ordinance's registration scheme does not meet these standards because it does not promote a significant government interest and is not narrowly tailored to promote the interests that the Village alleges are significant. Specifically, they argue that the Village has no significant interest to promote because (1) its interest in protecting its residents from annoyance in their homes simply is not a significant governmental interest and (2) while a government's interest in preventing fraud is significant, the Village has not shown that there is a real threat of fraud to its residents. The ordinance is not narrowly tailored, they maintain, because it does not leave open ample alternative channels of communication. Given these flaws, they conclude, we must prohibit the Village from enforcing the ordinance against them.

We disagree. There can be little doubt that the governmental interests the Village seeks to promote —

8. The Supreme Court made this clear in *Ward* where it said, "This less restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation. . . . Instead, our cases quite clearly hold that restrictions on time, place, or manner of protected speech are not invalid simply because there is some imaginable alternative that might be less burdensome on speech." *Ward*, 491 U.S. at 797 (internal citations and quotation marks omitted).

protecting its residents from fraud and undue annoyance in their homes — are sufficiently significant. *See Ward*, 491 U.S. at 796; *Hynes*, 425 U.S. at 616-17.[9] And, the harm the

9. Contrary to Watchtower's assertions at oral argument, the Court in *Martin v. City of Struthers* did not hold that a government's interest in protecting its residents from undue annoyance in their homes is insufficient to uphold an ordinance such a Stratton's. At best, the Court said that such an interest is insufficient to uphold an ordinance flatly prohibiting door-to-door canvassing. *See Martin*, 319 U.S. at 144. Further, Watchtower's argument demonstrates a misunderstanding of how the ordinance serves the Village's interest in protecting its residents from undue annoyances. The interest primarily supports the portion of the ordinance prohibiting canvassers from going to the doors of residents who have indicated they wish to be left alone. It does so by (1) attaching a criminal penalty to canvassers who ignore those wishes and (2) requiring identification from the canvasser prior to canvassing so that if he does ignore the wishes of the residents, the Village has information that will assist it in prosecuting the canvasser, thereby adding to the likelihood that a canvasser will be deterred from canvassing such residents. Nothing the Supreme Court has said suggests that this is not a sufficient interest to support a municipality promulgating a content-neutral ordinance such as Stratton's. In fact, the Court's opinions seem to suggest the opposite.

> The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free society. . . . Our prior decisions have often remarked on the unique nature of the home, the last citadel of the tired, the weary, and the sick, . . . and have recognized that preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.

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Village seeks to prevent — criminals posing as canvassers in order to defraud its residents — is a real threat. While the evidence of this reality is by no means overwhelming, we believe it is sufficient. That evidence consists of the testimony of Helen MacMurray, Ohio Assistant Attorney General; the Village's Mayor; and Frank Bruzzese, the Village's Solicitor. In her testimony, Ms. MacMurray stated that Ohio has had difficulty with several groups that perpetrate frauds by going door-to-door posing as solicitors or canvassers. And the testimony of the Village's Mayor and its Solicitor indicate that the Village was aware of problems in other Ohio cities with door-to-door fraud when it passed the ordinance. Plaintiffs argue the fact that Ohio has had

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> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear . . . , the home is different. That we are captives outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere. . . . Thus, we have repeatedly held that individual's are not required to welcome unwanted speech into their homes and that the government may protect this freedom.

Frisby v. Schultz, 487 U.S. 474, 484 (1988) (internal citations and quotation marks omitted); *see also Hynes*, 425 U.S. at 616-17. Several of our sister circuits have also held that the state's interest in protecting its citizens from undue annoyance is sufficient to support statutes facing intermediate scrutiny. *See, e.g., Van Bergen v. Minnesota*, 59 F.3d 1541, 1554 (8th Cir. 1995) (finding that Minnesota's interest in protecting its citizens from unwanted annoyances was a sufficient interest to regulate automated telephone calls); *Pennsylvania Alliance for Jobs & Energy*, 743 F.2d at 187.

problems with such fraud is insufficient to establish a real anticipated harm; they would instead require that Stratton itself have had problems with fraud before it could promulgate an ordinance to prevent fraud. That argument ignores the fact that the interest the ordinance promotes is preventing an anticipated harm. If we required the Village to wait until it had trouble with door-to-door fraud, we would be depriving it of a police power the Supreme Court has made clear municipalities possess. It also ignores the principle reaffirmed by the Supreme Court's holding in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000), that a city may use evidence from the experiences of other cities that are similarly situated to establish a reasonable ground to believe that an anticipated harm is real. *See also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-53 (1986). As municipalities may take the experiences of other municipalities into account, we pay deference to the Village's predictive judgment and the district court's finding in substance that "there [was] a reasonable ground to fear that serious evil [would] result if free speech [were] practiced" without the ordinance. *National Treasury Employees Union*, 513 U.S. at 475. Accordingly, the Village was entitled to promulgate an ordinance that was narrowly tailored to promote its interests in preventing fraud and in protecting its residents from unwanted annoyance.

And from our review of the record, we believe that is what the Village did. The ordinance promotes the Village's interest in protecting the privacy of its residents by creating additional deterrents for canvassers, including Jehovah's Witnesses, who are considering ignoring a resident's wishes and canvassing the resident's home. A Jehovah's Witness is

more likely to respect the resident's wishes not to be canvassed when a criminal penalty — albeit a light penalty — is connected to such conduct in addition to the threat of civil action. Thus, the penalty attached to canvassing the house of a resident with a No Solicitation Sign more effectively promotes the Village's interest. The ordinance's registration requirements also likely deter Jehovah's Witnesses from canvassing homes with No Solicitation Signs and forms because they are aware that the Village now has information — name, address, organization or cause — helpful in apprehending someone who ignores a resident's wishes. The extra deterrence the ordinance creates promotes the Village's interest in protecting its residents from undue annoyance and that interest "would be achieved less effectively absent the [ordinance]." *Ward*, 491 U.S. at 799.

As to the latter method of furthering the interest — the registration requirement — the dissent misstates the issue. It is not whether the requirement deters by increasing the degree of punishment. Rather it is whether the requirement increases the likelihood of punishment. It does.

The Village's interest in preventing fraud would also be achieved less effectively absent the ordinance. Absent a registration requirement, the Village has no way of assessing whether canvassers are in fact affiliated with an organization such as Jehovah's Witnesses or are instead perpetrators of fraud using a Jehovah's Witnesses claim as cover. Requiring the individuals to identify themselves as having a relationship with the organization provides the Village with information helpful in making this assessment. Consequently, the ordinance better equips the Village in its attempt to turn away

perpetrators posing as Jehovah's Witnesses. Moreover, the requirements go further than anti-fraud laws in deterring such individuals from committing fraud because they know the Village has information that would make it easier to apprehend them were they to do so.

We believe the dissent misunderstands our reasoning and the effect of the registration requirement. Its argument that the requirement burdens substantially more speech than necessary because it requires registration "not only for those wishing to engage in sales transactions — a possible avenue for fraud — but also for those wishing to engage in political, religious, or social advocacy" assumes too much. First, it assumes that the only avenue for engaging in fraud is posing as a sales person. That need not be the only avenue. Second, it assumes that one who intends to engage in fraud by posing as a sales person would be honest enough to inform the Village that he was intending to pose as a sales person and thus would register as such. That is not necessarily the case. It is also possible that the criminal would inform the Village that he was going to engage in political, religious, or social advocacy in order to avoid the registration requirement. It would be nice if the Village had the ability to discern in advance who, or what type of groups, will commit fraud. However, it does not. And absent such ability, the Village does not burden substantially more speech than necessary by requiring all individuals seeking to go door-to-door to register.

Moving to the final requirement of intermediate scrutiny, we believe that the ordinance leaves open ample alternatives of communication. Indeed, the ordinance does not foreclose

the option of going door-to-door; one only need register first. Plaintiffs' argument that the ordinance effectively forecloses that option to them because of their religious convictions, as we will discuss below, is foreclosed by the Court's decision in *Employment Division v. Smith*.[10] Further, there are several alternatives to door-to-door canvassing: Jehovah's Witnesses may spread their message at stores, on street corners, in restaurants, in parks, and other public forums.

This is not to say, as the dissent suggests we are holding, that meeting the ample alternatives requirement alone is sufficient to pass constitutional muster. Indeed, if that were the case, we would have foregone the rest of the analysis, evaluated the alternatives available to Jehovah's Witnesses, and called it a day.

As the ordinance satisfies the ample alternatives as well as the other requirements of intermediate scrutiny, we hold that the ordinance does not violate plaintiffs' free speech rights.

B. Free Exercise Claims

1. Whether the Ordinance is Unconstitutional

We reach the same conclusion with respect to plaintiffs' free exercise challenges. Other than arguments that the

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10. Plaintiffs and dissent argue that the Village could have included in the ordinance an exception from its requirements for Jehovah's Witnesses. If the Village had included such an exception, however, the ordinance would not be content neutral. Therefore, we do not believe that to be a viable alternative here.

ordinance fails strict scrutiny, plaintiffs offer no arguments for why the ordinance violates their free exercise rights.

Instead, they cite a handful of Supreme Court cases all of which, they claim, stand for the proposition that the "Supreme Court has continuously held that Jehovah's Witnesses cannot be required to obtain a permit in order to engage in door-to-door religious speech." And that "[i]n not one [of those cases] did the Supreme Court hold that Jehovah's Witnesses must obtain a permit prior to engaging in door-to-door dissemination of Bible-based ideas or literature." That is probably because few of those cases involved an ordinance requiring such a permit. Instead, many of the ordinances flatly prohibited the dissemination of ideas either in a public forum or door-to-door. *See Marsh v. Alabama*, 326 U.S. 501, 504 (1946); *Martin*, 319 U.S. at 142; *Schneider v. New Jersey*, 308 U.S. 147, 154, 156, (1939). The ordinances that did require a permit, unlike the Village's ordinance, left the decision whether to grant the permit at the discretion of a municipal officer. *See Tucker v. Texas*, 326 U.S. 517, 519 (1946); *Cantwell*, 310 U.S. at 302; *Schneider*, 308 U.S. at 158; *Lovell*, 303 U.S. at 451. In short, contrary to plaintiffs' assertions, not one of these cases mandates a finding that the ordinance violates their free exercise rights.

Nor does a general review of the ordinance under current law warrant such a finding. Under recent Supreme Court precedent, a law that is content neutral and of general applicability does not violate an individual's free exercise rights. *See Smith*, 494 U.S. at 879; *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

One that is not content neutral or not of general applicability, on the other hand, must pass strict judicial scrutiny. *See Church of Lukumi Babalu Aye*, 508 U.S. at 531-32.

We find the law to be both content neutral and of general applicability. In the context of free exercise challenges, a law is not content neutral if "the object of the law is to infringe upon or restrict religious practices because of their religious motivation." *Id.* at 532. To determine whether the law has such an object, we look to the language of the law; the operation of the law; and how officials apply the law. *See id.* at 532-35. A law is facially content based if it refers to a religious practice without a discernable secular meaning. *See id.* at 532. The ordinance does not. While the No Solicitation Form did refer specifically to Jehovah's Witnesses, it is not part of the text of the ordinance. Further, the district court ordered the Village to remove that language. The ordinance is also neutral in its operation; it imposes the same burdens on all individuals or organizations seeking to canvass door-to-door. *See id.* at 535. Finally, we believe that the Village officials have applied the ordinance neutrally. There is no indication that the Mayor discriminated against religious organizations in determining whether to grant permits. Indeed, there is little room for him to make any decision once the applicant completes the Registration Form. And contrary to plaintiffs' assertion, the Mayor's statements that he would not grant Jehovah's Witnesses an exemption from the ordinance's time restrictions on canvassing does not compel a finding that he unequally applied the ordinance. He has never applied the ordinance's time restrictions to them because they have never requested an exemption from the restrictions.

We also find that the law is of general applicability. To be generally applicable, the law must not be the product of a government action that, in pursuit of legitimate interests, "impose[s] burdens only on conduct motivated by religious belief essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 543. The ordinance is not the product of such action. The Village has made clear that its interest was in preventing fraud and protecting its residents from undue annoyance. In pursuing these ends, the ordinance burdens any individual seeking to canvass door-to-door. As the ordinance is content neutral and generally applicable, we hold that it does not violate plaintiffs' free exercise rights.

2. Exemption from the Ordinance

For the same reason, we deny plaintiffs' request for an exemption from the requirements of the ordinance. Plaintiffs argue that they should be granted an exemption from the ordinance because seeking permission to spread their religious beliefs violates their religious convictions. To support their argument they cite *Wisconsin v. Yoder*, 406 U.S. 205 (1972), for the proposition that where an individual's beliefs are a matter of deep rooted religious convictions and complying with the regulation would violate those convictions, the individual should be granted an exemption from complying with the regulation.

That is not the law. As the Court noted in *Smith*, it "has never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 878-79. Our review indicates that the ordinance is valid, and therefore, plaintiffs must comply with it.

In conclusion, we affirm the district court's judgment that the ordinance does not violate plaintiffs' First Amendment rights and we deny them an exemption from complying with the ordinance. We now review the Village's challenges to the district court's judgment awarding plaintiffs attorneys' fees.

III. ATTORNEYS' FEES

Briefly, the Village argues that the district court erred in awarding attorneys' fees by concluding (1) that plaintiffs were the prevailing party and (2) that they obtained substantial relief and were thus entitled to compensation for the time their attorneys expended on the entire course of the litigation. It contends that plaintiffs' relief was so small — and not of the type sought — that they cannot be considered the prevailing party. And, even if they are, by no means did they obtain the relief for which they hoped — being exempted from complying with the ordinance — and therefore cannot be considered to have achieved substantial success.

In reviewing an award of attorneys' fees under § 1988, we review the factual findings underlying the district court's determination of prevailing status for clear error and its award of attorneys' fees for abuse of discretion. *See Gregory v. Shelby County*, 220 F.3d 433, 446 (6th Cir. 2000). "A district court abuses its discretion when it relies on clearly erroneous findings of facts" or "when it improperly applies the law or uses an erroneous legal standard." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Bissell*, 210 F.3d 595, 597 (6th Cir. 2000).

Appendix A

We have no trouble agreeing with the district court's conclusion that plaintiffs were in fact the prevailing party. As a result of the litigation, their legal relationship with the Village was altered in a manner which they sought. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The question of whether this success is sufficient to be considered substantial is much tougher. The Village is correct that plaintiffs must still register prior to canvassing, and eliminating that requirement was a focal point of their lawsuit. As it is a close call, we defer to the factual findings of the district court and conclude that it did not abuse its discretion in awarding attorneys' fees in the amount of $39,340.87; $15,464.04 in out of pocket expenses; and $4,087.50 for paralegal costs.

Therefore, we affirm the district court's judgment awarding plaintiffs attorneys' fees and costs.

IV. CONCLUSION

For the foregoing reasons, we affirm the district court's judgments.

Appendix A

CONCURRING IN PART, DISSENTING IN PART

RONALD LEE GILMAN, Circuit Judge, concurring in part and dissenting in part. I agree with the majority that the Village of Stratton's ordinance is not unconstitutionally vague and does not violate the free exercise rights of the Jehovah's Witnesses. Because the ordinance is content neutral on its face, I also agree that intermediate scrutiny is the proper standard applicable to its review. Finally, I agree with the majority's decision to affirm the award of attorneys fees to the Jehovah's Witnesses.

I disagree, however, with the majority's application of the intermediate scrutiny standard, and would hold that the ordinance violates the First Amendment by burdening substantially more speech than is necessary to further the Village's legitimate interests. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Consequently, I would declare that the ordinance's permit requirement is unconstitutional as applied to the Jehovah's Witnesses.

The Supreme Court has long since recognized that the regulation of door-to-door solicitors must comport with the First Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940) (striking down an ordinance specifically requiring door-to-door solicitors for religious, charitable, or philanthropic causes to first obtain a permit). Content-neutral regulations, on the other hand, are analyzed under an intermediate scrutiny standard of review. *See Ward*, 491 U.S. at 798-99 (applying intermediate scrutiny to content-neutral noise regulations). This standard, however, does not mean that a content-neutral regulation "may burden substantially

more speech than is necessary to further the government's legitimate interests." *Id.* at 799. Rather, a content-neutral regulation must "focus[ ] on the source of the evils the [government] seeks to eliminate" and "eliminate them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." *Id.* at 800 n.7.

In the present case, the Village has articulated a legitimate interest in eliminating two evils — fraud and unwanted annoyance. The question, then, is whether the means chosen by the Village to implement its goals significantly restricts a substantial quantity of speech that does not create the same evils. I am of the opinion that the ordinance does just that.

First, by subjecting noncommercial solicitation to its permit requirements, the ordinance restricts a substantial amount of speech unrelated to the prevention of fraud. The ordinance requires a permit not only for those wishing to engage in sales transactions — a possible avenue for fraud — but also for those wishing to engage in political, religious, or social advocacy. Indeed, the Village's own "No Solicitation Registration Form" acknowledges that the ordinance reaches political candidates, Christmas carolers, and campaigners for social issues, none of whom create the threat of fraud that the Village intended to address. The ordinance therefore burdens substantially more speech than is necessary to promote the legitimate government interest of fraud protection. *See Cleveland Area Bd. of Realtors v. City of Euclid*, 88 F.3d 383, 386-90 (6th Cir. 1996) (applying an intermediate scrutiny standard to declare an ordinance unconstitutional

that banned all yard signs, concluding that the ordinance burdened substantially more speech than necessary to promote the legitimate government interest in aesthetics).

The majority emphasizes that "the ordinance does not foreclose the option of going door-to-door; one only need register first." Majority Op. at 20-21. Such an argument implies that because a person can engage in speech once he or she has obtained a permit, all permit requirements are constitutional. This is clearly *not* the law. *See Cantwell*, 310 U.S. at 303-07. Although a permit requirement is not per se invalid, it bears a heavy burden to pass constitutional muster because it gives public officials the power to deny the use of a forum in advance of actual expression. *See Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1390 (D.C. Cir. 1990) (finding unconstitutional, on the basis of intermediate scrutiny, an ordinance requiring permits of all people wishing to engage in content-neutral, noncommercial speech on transit authority property, where the "[p]ersons desiring to engage in any organized free speech activities in the . . . forum are subject to the permit requirement"). Consequently, the type of persons and entities subject to the permit requirement must be analyzed to determine an ordinance's impact on speech. *See id.* at 1393.

The majority also states that the Jehovah's Witnesses "may spread their message at stores, on street corners, in restaurants, in parks, and other public forums." Majority Op. at 21. The Supreme Court, however, has stressed the unique role of door-to-door solicitation as a means of communication, stating that "as every person acquainted with political life knows, door to door campaigning is one of the most accepted

techniques of seeking political support .... Door to door distribution of circulars is essential to the poorly financed causes of little people." *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943). I believe that this reasoning applies with equal force to the communication of religious beliefs. The availability, therefore, of other outlets for such speech does not alleviate the special burden that this ordinance places on door-to-door solicitation.

The narrowly tailored requirement demands a balance between the legitimate interests of the government and the constitutional rights of individuals. However, the majority opinion concludes in a very generalized way that the Village of Stratton's registration requirement is constitutional because it "more effectively promotes the Village's interest." Majority Op. at 19. But just as the majority accuses the dissent of assuming that those who intend to commit fraud would register as salespeople, the majority assumes (in my view, incorrectly) that those intending to commit fraud would in fact register at all.

As to the Village's asserted interest in protecting homeowners from "unwanted annoyances," this interest can be achieved by less restrictive means, such as by enforcing laws against trespass. *See Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 473 n.14 (6th Cir. 1991) (finding unconstitutional, even under intermediate scrutiny, a Cincinnati ordinance prohibiting the distribution of commercial handbills on public property because "there are many options available to the city that would address its aesthetic, safety, and proliferation concerns without placing the significant burden on commercial speech that the ordinance does").

Indeed, the Village already effectively achieves its interest in protecting homeowners from unwanted annoyances through the section of the ordinance that forbids solicitation at residences where the homeowners have posted "No Solicitation" signs. The same penalty, a fourth-degree misdemeanor, is imposed for violating the "No Solicitation" section as for violating the registration section of the ordinance. Thus someone who would register because they are deterred by the penalty for failing to do so would presumably already be deterred from ignoring a "No Solicitation" sign, while someone who is willing to risk the penalty imposed for ignoring a "No Solicitation" sign would presumably also be willing to risk the penalty for failing to register. The registration requirement, accordingly, is not narrowly tailored to protect homeowners from unwanted annoyances. *See Ward*, 491 U.S. at 799 (stating that a regulation is narrowly tailored under the intermediate scrutiny standard if it "promotes a substantial government interest that would be achieved less effectively absent the regulation").

"Our cases make clear that in assessing the reasonableness of a regulation [that affects speech], we must weigh heavily the fact that communication is involved." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). Consequently, "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Group, Inc.*, 120 S. Ct. 1878, 1888 (2000). This burden, however, "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites

are real and that its restriction will in fact alleviate them to a *material degree*." *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 625 (1995) (applying the intermediate scrutiny standard to restrictions on legal advertising) (citations omitted and emphasis added). In this case, the Village of Stratton has failed to demonstrate either the reality of the harm or the efficacy of the restriction.

For all of the reasons set forth above, I would hold that the ordinance's permit requirement is an unconstitutional infringement on the Jehovah's Witnesses' First Amendment rights.

APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION DATED AUGUST 6, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C2-99-526

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., et al.,

Plaintiffs,

v.

VILLAGE OF STRATTON, OHIO, et al.,

Defendants.

Aug. 6, 1999.

* * *

MEMORANDUM ORDER

SARGUS, District Judge.

On June 3, 1999, plaintiffs brought this action for preliminary and permanent injunctive relief seeking to enjoin defendants from enforcing a local Ordinance that allegedly interferes with plaintiffs' exercise of their constitutionally

protected rights to freedom of religion, freedom of speech, freedom of the press, and due process of law. Plaintiffs, both religious organizations which include practicing Jehovah's Witnesses, allege that the Ordinance is unconstitutional on its face and as applied because it interferes with their First Amendment right to go door-to-door in the Village of Stratton as part of their religious belief that they should share the Gospel with others. Defendants assert that the Ordinance is a content neutral, narrowly tailored regulation designed to protect the privacy interests of its citizens.

The parties and counsel convened in St. Clairsville, Ohio on July 27, 1999 for a hearing related to the preliminary and permanent injunction issues before the Court. After hearing a day of testimony and upon full consideration of the parties' briefs, the Court ruled from the Bench on plaintiffs' application for preliminary and permanent injunctive relief. This Order serves to memorialize those rulings.

The Village of Stratton, Ohio is a small town of fewer than 300 residents located along the Ohio River. In 1998, the Village passed an Ordinance that regulated the activities of solicitors and canvassers in the town. Generally, the Ordinance was designed to protect the privacy rights of the Village residents. According to the testimony of Frank Bruzzese, Village of Stratton Solicitor, the Ordinance was constructed to protect the Village residents from "flim flam" con artists who prey on small town populations.

It is without question that the Village of Stratton, through the powers accorded Ohio municipalities under Article XVIII, Section 3 of the Ohio Constitution, has the authority

to promulgate local laws concerning public health, safety, and welfare. *Cincinnati N & C Ry. Co. v. Cincinnati*, 71 F.2d 124 (6th Cir.1934). The valid police powers possessed by the various states and delegated to municipalities are, of course, restricted by the various rights set forth in the Constitution, particularly the First Amendment.

The Village Ordinance at issue is Ordinance No. 1998-5, which includes solicitor registration requirements and regulations. The Court must first determine whether this Ordinance applies to plaintiffs as Jehovah's Witnesses. Section 116.01 is the introductory statement of the Ordinance that prohibits uninvited soliciting within the Village of Stratton.[1] The Court finds that Ordinance No. 1998-5 does apply to plaintiffs because Jehovah's Witnesses are "canvassers" who visit homes in neighborhoods for the

---

1. Section 116.01 provides as follows:

> The practice of going in and upon private property and/or the private residences of Village residents in the Village by canvassers, solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise or services, not having been invited to do so by the owners or occupants of such private property or residences, and not having first obtained a permit pursuant to Section 116.03 of this Chapter, for the purpose of advertising, promoting, selling and/or explaining any product, service, organization or cause, or for the purpose of soliciting orders for the sale of goods, wares, merchandise or services, is hereby declared to be a nuisance and is prohibited.

See Plaintiffs' Trial Exhibit 1.

purpose of "explaining" their "cause," the Gospel of Jehovah. Therefore, the activities of the Jehovah's Witnesses are encompassed by the provisions of Ordinance No. 1998-5.

By the terms of the Ordinance, if a person or entity seeks to engage in conduct defined in Section 116.01, such party must first obtain a valid permit. Section 116.03 of the Ordinance speaks to the registration requirements for potential Village canvassers.[2] No fee is required to obtain a

2. Section 116.03 of the Ordinance states as follows:

> (a) No canvasser, solicitor, peddler, hawker, itinerant merchant or transient vendor of merchandise or services who is described in Section 116.01 of this Chapter and who intends to go in or upon private property or a private residence in the Village for any of the purposes described in Section 116.01, shall go in or upon such private property or residence without first registering in the office of the Mayor and obtaining a Solicitation Permit.
>
> (b) The registration required by subsection (a) hereof shall be made by filing a Solicitor's Registration Form, at the office of the Mayor, on a form furnished for such purpose. The Form shall be completed by the Registrant and it shall then contain the following information:
>
> (1) The name and home address of the Registrant and Registrant's residence for five years next preceding the date of registration;
>
> (2) A brief description of the nature and purpose of the business, promotion, solicitation, organization, cause and/or the goods or services offered;
>
> (Cont'd)

permit. The Court finds that subsections (1 – 4) of Section 116.03(b) are valid, content neutral governmental regulations designed for the safety and security of the Village residents. Subsections (1 – 4) do not infringe upon plaintiffs' First Amendment rights of speech, religion, or free press. The Court views subsection (5), which requires listing the specific address of each private Village residence a Registrant intends to visit, as an onerous regulation that could potentially violate the exercise of constitutional rights. The burden of this provision, however, is cured by the Village allowing a Registrant to attach to the Registration Form a list of willing Village residents which is provided by the Mayor's office.[3]

(Cont'd)

> (3) The name and address of the employer or affiliated organization, with credentials from the employer or organization showing the exact relationship and authority of the Applicant;
>
> (4) The length of time which the privilege to canvass or solicit is desired;
>
> (5) The specific address of each private residence at which the Registrant intends to engage in the conduct described in Section 116.01 of this Chapter; and
>
> (6) Such other information concerning the Registrant and its business or purpose as may be reasonably necessary to accurately describe the nature of the privilege desired.

3. The Court suggests that the Registrant be informed of this procedure somewhere on the Registration Form.

Failure on the part of the Village to make such lists readily available at no cost may render the Ordinance unconstitutional.

Subsection (6) requires applicants to provide information concerning the purpose of the canvassing activities "as may be reasonably necessary to accurately describe the nature of the privilege desired."[4] Just as business or political canvassers are required to be identified, Jehovah's Witnesses may also be required to state their business "as may be reasonably necessary to accurately describe the nature of the privilege desired." Ordinance No. 1998-5, Section 116.03(b)(6). While lesser known organizations, particularly those marketing commercial products or soliciting only for contributions, may need to provide additional information, this Court finds that, in order for subsection (6) to meet constitutional scrutiny, the plaintiff need only note on the application that it seeks to canvass as part of the Jehovah's Witness ministry. Based upon this interpretation, the Court finds Section 116.03 of the Ordinance to be constitutional on its face.

The Court notes that several groups were granted permission to solicit within the Village outside the time limits set forth in Section 116.05 of the Ordinance. Specifically, at least six separate solicitors for school fundraisers were permitted to canvas the neighborhoods in Stratton after 5:00 p.m. *See* Defendants' Trial Exhibits 35 A-F. In the event that other groups, including plaintiffs, are denied a permit

4. As the Court noted during the hearing, the exercise of a constitutional right is not a "privilege" and to that extent the Ordinance mischaracterizes the issue. Such mischaracterization does not, however, by itself render the Ordinance unconstitutional.

for the same number of hours, the Village will subject itself to future claims that the application of the Ordinance is not neutral and is violative of the First Amendment. At this juncture, the Court is not willing to reach such a conclusion, in that no such request for a similar permit has been made by either plaintiff.

The Court's greatest concern is the language set forth in Section 116.05 of the Ordinance which relates to time limitations of solicitations. Section 116.05 states that "[n]o activity permitted under authority of this chapter shall commence prior to 9:00 a.m. nor continue after 5:00 p.m. . . . ." The Court finds this provision of the Ordinance to be an invalid restriction of a canvasser's right to visit homes during reasonable hours. Section 116.05 unnecessarily chills the plaintiffs' First Amendment right to speech. Both solicitors or solicitees may be unavailable during these hours. In the summer months, these time limits exclude up to four hours of daylight, 5:00 p.m. to 9:00 p.m., during which constitutionally protected activities may occur.

It has long been recognized that any regulation of canvassing or soliciting "must be done, and the restriction . . . applied, in such a manner as not to intrude upon the rights of free speech and free assembly." *Thomas v. Collins*, 323 U.S. 516, 540-41, 65 S.Ct. 315, 89 L.Ed. 430 (1945). It is also beyond dispute that solicitation is a form of speech protected by the First Amendment. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).

A municipality may lawfully act to protect the peaceful enjoyment of local homes by its citizens. *Wisconsin Action*

Coalition v. City of Kenosha, 767 F.2d 1248, 1258 (7th Cir.1985). At the same time, any such local regulation must be precisely tailored to advance the governmental interest in a manner least restrictive of First Amendment rights. *New Jersey Citizen Action v. Edison Tp.*, 797 F.2d 1250 (3d Cir.1986).

A number of circuit courts have invalidated local ordinances purporting to ban solicitation or canvassing during daylight hours. *See Wisconsin Action Coalition*, *supra*; and *New Jersey Citizen Action*, *supra*. Recently, in *Ohio Citizen Action v. City of Seven Hills*, 35 F.Supp.2d 575 (N.D.Ohio 1999), the Court invalidated a local ordinance imposing a 5:00 p.m. curfew on canvassing. As noted in *National People's Action v. Village of Wilmette*, 914 F.2d 1008, 1012 (1990), "[e]ven a temporary deprivation of a First Amendment freedom of expression is generally sufficient to prove irreparable harm."

The Court also notes that any citizen may post "no trespassing" signs and prevent entry by canvassers or solicitors. Local governments and police are certainly authorized to prosecute trespassers under appropriate criminal laws. It is, however, for citizens and not government to choose whether private property is to be a forum for the expression of First Amendment rights.

The Court finds that to the extent canvassing is limited to 5:00 p.m. in the evening, Section 116.05 of the Ordinance is unconstitutional on its face. The Court, therefore, **ORDERS** that Section 116.05 of the Ordinance be modified to allow covered activities, including welcome door-to-door solicitation, to occur during reasonable hours of the day. This

may be easily accomplished by listing reasonable times on a month to month basis.

As a corollary issue, the Court notes that page three of the Registration Form consists of a listing of specific organizations or causes that a Registrant may check to more specifically identify itself. *See e.g.*, Defendants' Trial Exhibit 34-A. Item No. 6 reads "Jehovah [sic] Witnesses." No other religious group is listed separately or singled out on this list. In fact, item No. 17 of the listing reads, "Persons Affiliated with _____ Church _____." Although the Registration Form is an administrative form designed to facilitate compliance with the Ordinance, its language and its form must be content neutral. The Court finds that item No. 6 unnecessarily isolates the Jehovah's Witnesses as a group and **ORDERS** this item stricken from the Registration Form.

Finally, at the conclusion of the hearing and after completion of the presentation of evidence, defendants argued for the first time that plaintiff Watchtower Bible and Tract Society of New York, Inc. and the Wellsville, Ohio Congregation of Jehovah's Witnesses, Inc. are not proper parties to this action because both registrations with the Ohio Secretary of State had lapsed.[5] Plaintiff the Wellsville, Ohio Congregation of Jehovah's Witnesses, Inc. argued that during the time that its registration had lapsed, it was still a *de facto* corporation and still a viable legal entity able to bring suit. *See Antioch Baptist Church of Canton v. Jordan*, 1999 WL

5. The Court notes its displeasure with defendants for the untimeliness of this argument. The Court, which has otherwise been impressed with the lawyering in this matter, is dismayed that this issue was not raised earlier in the proceedings.

Appendix B

333335 (1999) (citing *Hines v. Board of Education of the Cleveland City School District* (1985), 26 Ohio Misc.2d 15, 18, 499 N.E.2d 39, citing *I.J. Goldstein Company v. Mitchell* (1921), 14 Ohio App. 231). Plaintiffs presented testimony from Mr. Virsil Koontz, an elder in the Jehovah's Witness Congregation of Wellsville, who stated that he had no knowledge that the state registration of the local congregation or the national governing body of Watchtower corporation had lapsed at any time and that the congregation has continued to operate as if it was duly licensed.

The Court makes only a preliminary finding at this stage that defendants' motion is not well-taken as to the Wellsville, Ohio Congregation of Jehovah's Witnesses, Inc. The Court, hereby, **ORDERS** defendants to brief the issue of whether the lapse of a corporate registration with the Secretary of State affects the legal capacity of the corporation. This brief shall be filed no later than July 29, 1999. Plaintiffs shall respond by August 5, 1999 with defendants reply brief due on August 12, 1999.

In sum, plaintiffs' motion for preliminary injunction is **GRANTED IN PART AND DENIED IN PART.** The Court finds that Ordinance No. 1998-5 applies to plaintiffs. The Court further finds Ordinance No. 1998-5, Section 116.05 to be an invalid, unconstitutional infringement upon plaintiffs' First Amendment rights. Finally, the Court reserves final ruling on the issue of whether plaintiff Watchtower Bible and Tract Society of New York, Inc. is a proper party to this action.

IT IS SO ORDERED.

APPENDIX C — FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION DATED AUGUST 18, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C2-99-526

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., et al.,

Plaintiffs,

v.

VILLAGE OF STRATTON, OHIO, et al.,

Defendants.

Aug. 18, 1999.

* * *

ORDER

Defendants have withdrawn their defenses regarding the capacity to sue by plaintiffs Watchtower Bible and Tract Society of New York, Inc. and Wellsville, Ohio Congregation of Jehovah's Witnesses, Inc. The issue of capacity to sue was left open after the Court heard testimony on plaintiffs' motion for preliminary and permanent injunction. With

defendants having withdrawn their defense to this issue, the Court now issues a Final Order granting in part and denying in part plaintiffs' motion for preliminary and permanent injunction (Doc. 3). The Court incorporates by reference its reasoning and rulings from its August 6, 1999 Memorandum and Order.

This case is **DISMISSED.**

IT IS SO ORDERED.

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION DATED FEBRUARY 23, 2000 AND FILED FEBRUARY 24, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. C2-99-526
JUDGE EDMUND A. SARGUS, JR.
MAGISTRATE JUDGE MARK R. ABEL

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., et al.,

Plaintiffs,

vs.

VILLAGE OF STRATTON, OHIO, et al.,

Defendants.

OPINION AND ORDER

This matter before the Court for consideration of the Plaintiffs' Motion for Attorneys' Fees and Costs. For the reasons that follow, the Motion is granted in part.

I.

On August 6, 1999, this Court issued a Memorandum Order setting forth the history of this case. To summarize,

Appendix D

Plaintiffs brought this action for preliminary and permanent injunctive relief seeking to enjoin the Defendants from enforcing a local Ordinance interfering with Plaintiffs' exercise of their constitutionally protected rights to freedom of religion and speech. Plaintiffs are religious organizations which include practicing Jehovah's Witnesses. The Plaintiffs successfully contended that an ordinance enacted by the Village of Stratton, Ohio, unconstitutionally infringed upon their First Amendment rights to go from door-to-door to various residences within the Village of Stratton as part of their religious belief that they should share the Gospel with others.

Following a hearing on July 27, 1999, this Court issued a preliminary injunction restraining the enforcement of certain portions of Ordinance No. 1998-5, Section 116.05, finding the same to be an unconstitutional infringement upon the Plaintiffs' First Amendment rights. Before so finding, the Court noted that the Defendants had agreed to allow any applicant for a permit to conduct door-to-door solicitation to obtain from the Village a list of each resident. Had the Village not so agreed, the Court noted that this restriction upon the right to engage in protected activity would otherwise be unconstitutional. In the same vein, the Court held that Section 116.03(b)(6) of the Ordinances of the Village of Stratton could be construed to meet constitutional scrutiny, insofar as the members of the Jehovah Witnesses seeking to canvass within the Village were only required to describe their activities as part of the Jehovah Witnesses' Ministries. Otherwise, the Ordinance, if read to require a detailed description of the type of activities to be conducted with attendant review by public authorities, could be unconstitutional.

Appendix D

The Court declared that Section 116.05 of the Ordinance prohibiting solicitation after 5:00 p.m. was an unreasonable infringement upon the Plaintiffs' First Amendment rights. The Court thereupon enjoined the Defendants from enforcing such provisions. Finally, the Court also found that the methods used by Village officials as a means of administering the challenged Ordinance unconstitutionally singled out Jehovah Witnesses on a form given to Village residents on which they could indicate that certain types of solicitation were not permitted on their private properties.

In the Court's view, the Plaintiffs' prevailed on several significant challenges which they brought to the constitutionality of Ordinance No. 1998-5 enacted by the Village of Stratton.

II.

In *Alveska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975), the Supreme Court reaffirmed the American rule which leaves to each party in a lawsuit the costs of its own attorneys' fees, unless the statutory provision provides to the contrary. Shortly after this decision, Congress enacted the Civil Rights Attorneys' Fees Awards Act of 1976 authorizing district courts to award a reasonable attorneys fee to parties which have prevailed in civil rights litigation. 42 U.S.C. §1988(b).

In *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), the Supreme Court instructed that the starting point for a determination of the amount of attorneys' fees is "the number of hours reasonably expended on litigation multiplied by a

reasonable hourly rate." The Supreme Court also recognized that, in general, time expended on unsuccessful claims is not chargeable to the opposing party. The Court was careful to note, however, that in some cases, "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Id.* at 435. The Court instructed that in such circumstances the district court should then focus on the result obtained by the Plaintiff in relation to the billable hours claimed to be expended on the litigation. The Court concluded:

> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment.

Id. at 436-37.

It is true that the Plaintiffs did not prevail on all of the claims which they brought in this action. It is the Court's view, however, that in addition to being the prevailing party insofar as the Plaintiffs induced this Court to issue an injunction, Plaintiffs were substantially successful in their attack on the challenged Ordinance. The law is clear that a Plaintiff need not prevail on every single claim to be the prevailing party, as the same is used in 42 U.S.C. §1988. *Farrar v. Hobby*, 506 U.S. 103 (1992).

The Plaintiffs have itemized the attorneys' fees which they ask this Court to award them. Three attorneys have submitted itemized statements together with brief descriptions of their prior experience and expertise. In light of these submissions, together with the Court's observation of the work performed by all three counsel, the Court readily concludes that an hourly rate of $225.00 is reasonable in light of the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) and adopted by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. at 432. Further, the Court is of the same opinion with respect to the hourly rate charged by a paralegal, that being $75.00 per hour. The Court notes that, while the Defendants have not agreed to the rates in question, they have not specifically challenged the same.

The Plaintiffs also seek to recover out-of-pocket expenses in the amount of $15,464.04. Again, while the Defendants have not agreed to the reasonableness of such amount, they have not claimed that any expense set forth was not actually incurred or was available at lower cost.

The Defendants have objected to inclusion of expenses associated with Professor Brandl, who testified at the trial held in St. Clairsville, Ohio. While Professor Brandl's professional fees are not included in the billing submissions, his expenses in the amount of $770.00 have been submitted by the Plaintiffs. In addition, the billing statement submitted by the attorneys include some amount of time, albeit undifferentiated, preparing for his testimony. The Defendants assert that because the subject matter on which Professor Brandl testified did not result in a victory for the Plaintiffs, any cost associated with Professor Brandl should be eliminated.

Appendix D

The Court has carefully reviewed the billing submissions by all three counsel and concludes that the dissection sought by the Defendants is both impractical and unreasonable. Because the Plaintiffs prevailed on a substantial portion of their claims, and the testimony adduced was otherwise indivisible as to the various claims, such division of the billing by claim is impracticable. Further, the Court notes that counsel for the Plaintiffs have not asked for a multiplier of the lodestar, which makes the Court more inclined to award Plaintiffs fees for the entire course of litigation.

The Defendants also urge this Court to consider that, given the hourly rate of $225.00 sought by each of the three Plaintiffs' counsel, they should not be required to pay for duplication of services. The billing records reflect that all three counsel, two of whom are from New York, traveled to St. Clairsville, Ohio for a one-day trial. In addition, all three counsel, billing at the rate of $225.00 per hour, attended four depositions on July 13, 1999.

This Court again emphasizes that all three of Plaintiffs' counsel exhibited a high degree of professional skill and experience in handling the issues raised in this case. Nonetheless, the Court is unable to conclude that three highly skilled lawyers were required to attend the depositions and hearing occurring in this case. The Court notes that the hearing lasted for a single day. Two days of depositions were taken in this case, including four which occurred on July 13, 1999 and three which occurred on July 15, 1999. The Plaintiffs filed a Complaint, a Motion for a Preliminary Injunction, a Reply to Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction,

Appendix D

and a Response to the Defendants' Memorandum Concerning the Plaintiffs' Capacity to Sue.

The Supreme Court has stressed that attorneys' fees awarded under §1988 should be based on a market rate for services rendered. While again emphasizing that the quality of the work performed by Plaintiffs' counsel exhibited a high degree of professionalism, the Court does not believe that the Defendants should be required to pay for three attorneys at the rate of $225.00 an hour. While not all of the time billed by the three counsel duplicates the work of the other two, the Court notes substantial periods of billable hours for which all three attorneys were present and billing.[1] Nothing in this Opinion is intended to criticize the use of three highly skilled attorneys in the same case. Parties are at liberty to employ as many counsel as they deem necessary. Because the attorney-client relationship is a close one, parties frequently use counsel with whom they may have a long-time relationship, while also hiring additional counsel more familiar with a particular area of law or a district court. The Court by no means intends to discourage such practices. The question raised in the Motion, however, is how much the Defendants must pay for the Plaintiffs' attorneys' fees.

The Court finds that the out-of-pocket expenses in the amount of $15,464.04 submitted by the Plaintiffs is reasonable and the same is awarded against the Defendants.

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1. The Court refers to page 12 of the Defendants' Brief in Opposition to Plaintiffs' Motion for Attorneys' Fees. The chart therein set forth demonstrates a large number of overlapping hours billed by three counsel.

Appendix D

The Court also finds that paralegal costs in the amount of $4,087.50 is also reasonable and the same is awarded in favor of the Plaintiffs.

The Plaintiffs seek attorneys' fees in the amount of $78,681.75. For the reasons set forth above, such amounts include duplicate, overlapping billable hours. While these hours of services were no doubt performed, the costs of such overlapping hours may not be billed to the Defendants. The Court believes that a fair method of analysis begins with consideration of the fees incurred by Susan B. Gellman, a Columbus attorney who is a recognized specialist in the First Amendment field. Her fees total $33,645.75. While Ms. Gellman did not perform all of the work involved in this case, she attended the hearing and performed much of the work in this case. The Court notes that she attended the depositions of four witnesses on July 13, 1999 but did not attend the depositions of four witnesses on July 12, 1999. Finally, Ms. Gellman prepared the Complaint and the Motion for the Preliminary Injunction.

The Court believes that all of Ms. Gellman's fees, billed without reference to any overlapping hours billed by Attorneys Polidoro and Moake, are reasonable and appropriate. Because the work performed by Plaintiff's counsel in this case was not done exclusively by Ms. Gellman, the Court is inclined to award an additional amount over and above the $33,645.75 expended by Ms. Gellman. The Court is of the view that attorneys' fees in the amount of $39,340.87, representing one-half of the total billing submitted by all three of Plaintiffs' counsel, is a reasonable fee in light of the services performed and the success achieved by the Plaintiffs.

Appendix D

III.

It is the **ORDER** of this Court that the Defendants shall pay to the Plaintiffs the sum of $39,340.87 as and for attorneys' fees, $4,087.50 in paralegal costs, and $15,464.04 in out-of-pocket expenses.

IT IS SO ORDERED.

2-23-2000
DATE

s/ Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E — RELEVANT ORDINANCE

ORDINANCE NO. 1998-5

ORDINANCE REGULATING UNINVITED PEDDLING AND SOLICITATION UPON PRIVATE PROPERTY IN THE VILLAGE OF STRATTON, OHIO, AND AMENDING ORDINANCE NO. 1996-__ OF THE ORDINANCES OF THE VILLAGE OF STRATTON, OHIO.

BE IT ORDAINED BY THE COUNCIL OF THE VILLAGE OF STRATTON, OHIO, that Ordinance No. 1996-06 of the Ordinances of the Village of Stratton, Ohio, which was passed on September, 1996, is hereby amended, by replacing the language of said Ordinance No. 1996-06 in its entirety, with the following language:

BE IT ORDAINED BY THE COUNCIL OF THE VILLAGE OF STRATTON, OHIO, that, pursuant to authority granted in Section 715.61 of the Ohio Revised Code, and pursuant to Home Rule powers vested in the Village under Section 3, Article XVIII of the Ohio Constitution, the Codified Ordinances of the Village of Stratton, Ohio are hereby amended by the adoption of the following Chapter and Codified Ordinance Sections.

Appendix E

CHAPTER 116

Peddlers and Solicitors

116.01 Uninvited peddling and soliciting declared a nuisance.

116.02 Enforcement.

116.03 Solicitor's Registration and Permit — Prohibition of unregistered solicitation, etc.

116.04 Issuance of permit; fee, content and display; effect.

116.05 Time limitations.

116.06 Denial or Revocation of permit.

116.07 Owner/occupant prohibition — "No Solicitation" Registration.

116.98 Penalty.

CROSS REFERENCES

Power to inspect food products — see Ohio R.C. 715.46
Power to regulate — see Ohio R.C. 715.61 et seq.
Home solicitation sales — see Ohio R.C. 1345.21 et seq.
Charitable solicitations — see Ohio R.C. Ch. 1716
Trespassing — see Ohio R.C. 2909.21
Frozen desserts — see Ohio R.C. 3717.51 et seq.
Littering — see Ohio R.C. 3767.20

Appendix E

116.01 UNINVITED PEDDLING AND SOLICITING DECLARED A NUISANCE.

The practice of going in and upon private property and/or the private residences of Village residents in the Village by canvassers, solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise or services, not having been invited to do so by the owners or occupants of such private property or residences, and not having first obtained a permit pursuant to Section 116.03 of this Chapter, for the purpose of advertising, promoting, selling and/or explaining any product, service, organization or cause, or for the purpose of soliciting orders for the sale of goods, wares, merchandise or services, is hereby declared to be a nuisance and is prohibited.

116.02 ENFORCEMENT

The Chief of Police (Village Marshall) and Village Police Officers are hereby required and authorized to abate any such nuisance as is described in Section 116.01.

116.03 REGISTRATION REQUIRED — PROHIBITION OF UNREGISTERED SOLICITATION, ETC.

(a) No canvasser, solicitor, peddler, hawker, itinerant merchant or transient vendor of merchandise or services who is described in Section 116.01 of this Chapter and who intends to go in or upon private property or a private residence in the Village for any of the purposes described in Section 116.01, shall go in or upon such private property or residence without first registering in the office of the Mayor and obtaining a Solicitation Permit.

Appendix E

(b) The registration required by subsection (a) hereof shall be made by filing a Solicitor's Registration Form, at the office of the Mayor, on a form furnished for such purpose. The Form shall be completed by the Registrant and it shall then contain the following information:

(1) The name and home address of the Registrant and Registrant's residence for five years next preceding the date of registration;

(2) A brief description of the nature and purpose of the business, promotion, solicitation, organization, cause, and/or the goods or services offered;

(3) The name and address of the employer or affiliated organization, with credentials from the employer or organization showing the exact relationship and authority of the Applicant;

(4) The length of time for which the privilege to canvass or solicit is desired;

(5) The specific address of each private residence at which the Registrant intends to engage in the conduct described in Section 116.01 of this Chapter; and,

(6) Such other information concerning the Registrant and its business or purpose as may be reasonably necessary to accurately describe the nature of the privilege desired.

116.04 ISSUANCE OF PERMIT; FEE, CONTENT AND DISPLAY.

Each Registrant who complies with Section 116.03(b) shall be furnished a Solicitation Permit. The permit shall indicate that the applicant has registered as required by Section 116.03 of this Chapter. No permittee shall go in or upon any premises not listed on the Registrant's Solicitor's Registration Form.

Each person shall at all times, while exercising the privilege in the Village incident to such permit, carry upon his person his permit and the same shall be exhibited by such person whenever he is requested to do so by any police officer or by any person who is solicited.

Section 116.01 of this Chapter shall not apply and shall not be construed to apply to the holder of a valid permit issued pursuant to this Section.

116.05 TIME LIMITATIONS.

No activity permitted under authority of this chapter shall commence prior to 9:00 a.m. nor continue after 5:00 p.m. This time limitation shall be stated on the permit.

116.06 DENIAL OR REVOCATION OF PERMIT.

Permits described in Section 116.04 of this Chapter may be denied or revoked by the Mayor for any one or more of the following reasons:

(a) Incomplete information provided by the Registrant in the Solicitor's Registration Form.

(b) Fraud or misrepresentation contained in the Solicitor's Registration Form.

(c) Fraud, misrepresentation or false statements made in the course of conducting the activity.

(d) Violation of any of the provisions of this chapter or of other Codified Ordinances or of any State or Federal Law.

(e) Conducting canvassing, soliciting or business in such a manner as to constitute a trespass upon private property.

(f) The permittee ceases to possess the qualifications required in this chapter for the original registration.

The revocation of a permit shall be in addition to any penalty provided in Section 116.99 of the Codified Ordinances of the Village of Stratton, Ohio, or any other penalty that may be imposed upon the permittee in accordance with law.

116.07 OWNER'S/OCCUPANT'S PROHIBITION AGAINST ENTRY.

(a) Notwithstanding the provisions of any other Section of this Chapter 116, any person, firm or corporation who is

Appendix E

the owner or lawful occupant of private property within the territorial limits of the Village of Stratton, Ohio, may prohibit the practice of going in or upon the private property and/or the private residence of such owner or occupant, by uninvited canvassers, solicitors, peddlers, hawkers, itinerant merchants or transient vendors, by registering its property in accordance with Subdivision (b) of this Section and by posting upon each such registered property a sign which reads "No Solicitation" in a location which is reasonably visible to persons who intend to enter upon such property.

(b) The registration authorized by Subsection (a) hereof shall be made by filing a "No Solicitation Registration Form", at the office of the Mayor, on a form furnished for such purpose. The form shall be completed by the property owner or occupant and it shall then contain the following information:

(1) The name and address of the owner or occupant who wishes to prohibit uninvited canvassing, soliciting, peddling, hawking, merchandising and/or transient vending upon the private property of the owner or occupant;

(2) The specific address of each property at which the owner or occupant prohibits such conduct; and,

(3) A written and signed statement which reads:

"I, the undersigned, am the owner or lawful occupant of private property which is described in this No Solicitation Form, and

Appendix E

I, hereby, give notice that I prohibit the practice of uninvited canvassers, solicitors, peddlers, hawkers, itinerant merchants or transient vendors coming upon my private property for the purpose of soliciting the attention of any occupant of that property or for the purpose of advertising, promoting, selling and/or explaining any product, service, organization or cause, or for the purpose of soliciting orders for the sales of any product.

I have posted a sign which reads, "No Solicitation", at the property, and the sign is located so that it is reasonably visible to persons who might be considering entering upon the property.

I consider any person entering upon the property for a prohibited purpose to be a trespasser.

The only exceptions to this prohibition are the persons and organizations listed below:

_____

_____

_____

_____

_____

_____

_____

_____"

(c) No uninvited canvasser, solicitor, peddler, hawker, itinerant merchant or transient vendor of merchandise or services, shall go in or upon the private property of an owner or occupant of property who has registered and posted such property in accordance with Subsections (a) and (b) of this Section, for the purpose of advertising, promoting, selling or explaining any product, service, organization or cause, or for the purpose of soliciting orders for the sale of goods, wares, merchandise or services.

(d) The holder of a permit issued pursuant to Section 116.04 of this Chapter shall not be exempt from the prohibition contained in Subsection (c) of this Section. The holder of such permit shall not go in or upon any private property which has been registered and posted in accordance with Subsection (a) and (b) of this Section, for the purpose of advertising, promoting, selling or explaining any product, service, organization or cause, or for the purpose of soliciting orders for the sale of goods, wares, merchandise or services.

116.99 PENALTY.

(a) Violation of Section 116.01 is a misdemeanor of the fourth degree, the penalty for which is set forth in Section 999.99 of the Codified Ordinances of the Village of Stratton, Ohio.

(b) Violation of Section 116.03 is a misdemeanor of the fourth degree, the penalty for which is set forth in Section 999.99 of the Codified Ordinances of the Village of Stratton, Ohio.

(c) Violation of Section 116.07(c) is a misdemeanor of the fourth degree, the penalty for which is set forth in Section 999.99 of the Codified Ordinances of the Village of Stratton, Ohio.

(d) Violation of Section 116.07(d) is a misdemeanor of the fourth degree, the penalty for which is set forth in Section 999.99 of the Codified Ordinances of the Village of Stratton, Ohio.

SECTION 2: This Ordinance is hereby declared to be an emergency Ordinance, necessary to the preservation of the public peace, safety and welfare of the citizens of the Village of Stratton, Ohio, and such emergency exists by reason of the fact that the failure to regulate the time and manner of the conduct which is regulated by the above Ordinance, and the failure to identify those engaged in such conduct, creates a risk of unwanted intrusion, annoyance and potential harm to Village residents who are less able, than the Village, to identify and regulate the conduct of persons, corporations, entities and organizations engaged in such conduct.

SECTION 3: This Ordinance shall be in full force and effect immediately upon its passage.

_____
MAYOR

ATTEST: s/ Lola Kakascik
CLERK